hostage, and in a way they are, but you must be careful and not proceed with actions that could be perceived as retaliatory." (Frazier Depo. p. 26; App. O7) Frazier recalls that Petitioner and Sadler were two of the employees. Frazier told them "those folks who participate in the investigation should not, again- -should be able to go forward without fear of retaliation". (Frazier Depo. p.26, 27; App. O7, O8).

Frazier then contacted Sadler with regard to the sexual harassment investigation of Hughes. (Sadler Aff. ¶ 5; App. G2-G3). Within a few days of June 12, 2002, Ms. Sadler met with Ms. Frazier and told her of Gene Hughes' sexual harassment of others despite fears of being fired. (Sadler Aff. ¶ 7; App. G3-G4).

On June 24, 2002, Petitioner met with Veronica Frazier. Petitioner at that point told Veronica Frazier that she was very concerned and felt that she would lose her job if she participated in this investigation. Veronica Frazier assured Petitioner that would not happen. Based upon this assurance, Petitioner told Frazier of Hughes' sexual harassment of her. (Proffitt Aff. ¶13, 14; App. H5-H6).

Contemporaneously with these events, Dr. Williams asked all the heads of all the departments how they wanted jobs funded. The department heads would then have input into the decision with regard to what position should be

funded within each department. Hughes headed Petitioner's department where she worked on a part time basis. (Proffitt Aff. ¶ 9; App. H5). Williams asked Hughes what Plaintiff's job duties were and he informed her that Plaintiff helped out with Teacher of the Year "and other little things" that he managed. (Williams Depo. p. 58; App. Q7). Williams informed Veronica Frazier during the investigation of Hughes that Petitioner was doing merely a clerk's work. (Frazier Depo. p. 72; App. O15).

On June 27, 2002 at 3:23 P.M. and 4:28 P.M., Shannon Puckett from the Payroll Department sent e-mail to Gene Hughes with regard to the costs of the Petitioner's position. (Ex. 29; App. M).

On June 28, 2002, four days after fully cooperating with the Metropolitan Government's investigation of Hughes and one day after Gene Hughes received an e-mail about the cost of the Petitioner's position, Petitioner received a phone call from Dr. Williams, the head of the Human Resources Department, telling her not to report to work anymore because there was no money in the budget for her employment any longer. (Proffitt Aff. ¶ 20; App. H7).

On September 13, 2002, Frazier finalized the fact-finding report. The report concluded that Hughes did engage in inappropriate and unprofessional behavior. (Ex.6; App. F).

The only three employees who made statements about Hughes engaging in sexual inappropriate conduct were Sadler, Crawford, and Petitioner. (Frazier Depo. pp. 61-62; App. O10-O11). The three individuals who complained to Ms. Frazier of the sexual harassment by Hughes were immediately investigated and all three promptly discharged. Dr. Williams was waiting in Sadler's office to fire her when Sadler returned from Dr. Garcia's office after having picked up the fact-finding report (Sadler Aff. ¶¶ 10-11; App. G5-G6). Petitioner's position was eliminated four days after Frazier interviewed her. (Proffitt Aff. ¶ 13, 20; App. H5-H6, H7). Vicky Crawford was terminated in November of 2002 after having been accused of embezzlement and drug use (Crawford Aff. ¶¶ 11-13: App. I3).

It is critical to note that on September 13, 2002, the same date that the fact-finding report was sent out by Veronica Frazier, Frazier sent a letter to the internal audit department requesting that an investigation be conducted into certain improprieties brought to her attention. As a result of that investigation, Frazier was contacted by KPMG and questioned with regard to three employees: Crawford, Petitioner, and Sadler, the exact three who had testified against Hughes. (Frazier Depo., pp. 68-69; App. O12-O13).

Frazier had no concerns at all about retaliation even though these three employees were the three employees who complained about Hughes No investigation was conducted into these retaliation claims despite a policy that required that this be investigated. (Frazier Depo. p. 70, 85, 86; App. O14, O18, O19) (Hughes Depo. p. 128; App. E11).

REASON FOR GRANTING THE PETITION

Petitioner would respectfully request that this Honorable Court set forth a standard to be applied in retaliation cases under Title VII in establishing a *prima facie* case that is not dependent upon evidence that in large measure can only be obtained form the lips of the Defendants.

Both the Sixth Circuit Court of Appeals and the District Court found that the Petitioner had failed to establish a *prima facie* case of retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. 2000(e) *et seq.*, because of the "bald denial" of one of the retaliators, Dr. Williams, that the retaliator knew that the Petitioner was engaging in protected activity. Petitioner's claim was dismissed despite the fact that approximately two weeks before engaging in protected activity the retaliator informed the Petitioner that

she would continue in her position with the Respondent and then the retaliator eliminated Petitioner's position four days after she engaged in protected activity. It is indisputable that the Respondent entity knew through its human resources department that the Petitioner was engaging in protected activity. The Petitioner was unable to establish her *prima facie* case because the Petitioner had limited evidence of Dr. Williams's knowledge that the Petitioner had engaged in protected activity. This was in large measure due to the fact that the Petitioner had not communicated directly with Dr. Williams with regard to the protected activity. Petitioner would state that she was unable to establish her *prima facie* case based upon the lack of evidence that was in large part only obtainable from testimony from the alleged retaliator.

Petitioner would respectfully request that this Court establish a set standard for setting forth a *prima facie* case in retaliation cases that will not bar a retaliation claim based upon lack of evidence that in many cases can be obtained only from the lips of the alleged retaliators. The need for this set standard is even more compelling when it is considered that the Petitioner had worked for this Respondent for over 27 years and had an excellent work history, but yet had her position eliminated four days after engaging in protected activity. It should be noted that not only was the Petitioner's position eliminated four days after engaging in protected activity, but that all individuals who complained that Dr.

Hughes sexually harassed them were promptly terminated by this Respondent.

The United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973) and its progeny established a burden of proof which allows an employee in a discrimination case to prove his case through circumstantial evidence, because the Courts recognize that it is a rare situation when direct evidence of discrimination is readily available. "Rarely can discriminatory intent be ascertained through direct evidence because rarely is such evidence available. This is the reason for the *McDonnell Douglas-Burdine* burden of proof mechanism, allowing a plaintiff to prove its case through circumstantial evidence. It is the rare situation when direct evidence of discrimination is readily available, thus victims of employment discrimination are permitted to establish their cases through inferential and circumstantial proof." *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 348 (6th Cir. 1997) *citing United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1483, 75 L.Ed.2d 403 (1983) ("[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"). "We are guided in this determination by the reality that intentional discrimination is often difficult to prove without significant reliance on circumstantial evidence. Rarely will there be direct evidence from the lips of the defendant proclaiming his or her racial

animus." *Robinson v. Runyon*, 149 F.3d 507, 513 (6th Cir. 1998).

As recognized by Justice Souter in his dissent in *Saint Mary's Honor Center v. Hicks, 509 U.S. 502, 534, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)*;"the possibility of some practical procedure for addressing what *Burdine* calls indirect proof is crucial to the success of most Title VII claims, for the simple reason that employers who discriminate are not likely to announce their discriminatory motive." As noted in *U.S. Postal Service BD of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478 (1983), all courts have recognized that the question facing "triers of fact in discrimination cases are both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflected important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes".

As a precept long recognized by our judicial system the burden of establishing this *prima facie case* is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094 (U.S. 1981)

The same reasoning should apply to establishing a *prima facie* case of retaliation under Title VII. Thus, the judicial system should recognize that rarely will there be

direct evidence from the lips of the retaliator proclaiming that he is retaliating against the employee. It would place an onerous burden upon the Petitioner to have to prove her *prima facie* case from the testimony of the retaliator.

Petitioner would respectfully state that in establishing a *prima facie* case of retaliation, the Sixth Circuit is in the minority of circuits that require, as a separate and distinct prong, that the employee establish knowledge on behalf of the decision maker. In *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987), the Sixth Circuit set forth the following elements to establish a *prima facie* claim of retaliation: "(1) that the Plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the Defendant; (3) that, thereafter, the Defendant took an employment action adverse to the Plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Id.* at 500. In establishing these four factors, the Sixth Circuit cited the Ninth Circuit's opinion in *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). In *Cohen*, however, the Ninth Circuit found that a *prima facie* case is established by showing that "she engaged in a protected activity, that she was thereafter subjected by her employer to adverse employment action, and that a causal link exists between the two". *Id.* at 796. The second factor, i.e. the knowledge factor, was considered part of the causal connection with the Cohen court stating, "Essential to a

causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity". *Id.* at 797.

In our situation, while it is indisputable that the Respondent, the Metropolitan Government of Nashville and Davidson County, knew of the Petitioner's exercise of protected activity through its human resources department, both the Sixth Circuit and the District Court were persuaded by the testimony of one of the alleged retaliators, Dr. Williams, which the District Court characterized as a "bald denial" of knowledge of the Petitioner's protected activity in finding that the Petitioner had not established a *prima facie* case of discrimination. (App.) Petitioner would state that if Dr. Williams were of a mind to retaliate it would be extremely unlikely to find direct evidence from Dr. Williams that she did indeed know of this protected activity. Petitioner would state that this prong of establishing a *prima facie* case should be revised so that the employee's *prima facie* case should not be dependent upon the testimony of one of the retaliators. This evidence of whether the retaliator admits knowledge of the protected activity should not be allowed to bar a claim but rather should be but one factor in many to consider in establishing a *prima facie* case.

In setting forth the factors required to establish a *prima facie* showing of retaliation, only the Sixth Circuit and the Second Circuit require that the Plaintiff establish

knowledge of the Defendant as a separate and distinct factor. Thus, regardless of clear proof that the Defendant Employer knew the Plaintiff was engaging in protected activity, if the Plaintiff is unable to clearly establish that the decision maker knew of the alleged action, this operates as an absolute bar to any retaliation claim. Oftentimes, this would mean that the Plaintiff would need the testimony of the alleged retaliator to establish her *prima facie* case.

Most Circuits do not have the knowledge requirement built in as a separate and distinct part of a *prima facie* retaliation claim; rather the knowledge factor is built into the causal connection factor. Plaintiff would state that this is probably done in recognition of the fact, as it was recognized in the line of cases after *McDonnell Douglas*, that individuals who are of a mind to discriminate rarely admit such.

The majority of the other circuits do not even have this second prong, i.e., the knowledge prong in setting forth a *prima facie* case. These circuits in large part have held that to establish a *prima facie* case of discriminatory retaliation under Title VII, the Plaintiff must show (1) that she engaged in a protected activity; (2) that the employer took adverse action against her; and (3) that a causal link exists between the protected activity and the employer's adverse action. *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994), *Kachmar v. SunGard Data Sys. Inc.*, 109 F.3d 173, 177 (3rd

Cir. 1997). *Honor v. Booz-Allen and Hamilton, Inc.*, 383 F.3d 180, 188 (4th Cir. 2004), *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 267 (5th Cir. 1994), *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 642 (7th Cir. 2002), *Griffith v. City of Des Moines*, 387 F.3d 733, 738 (8th Cir. 2004), *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000), *Cross v. The Home Depot*, 390 F.3d 1283, 1285, 1286 (10th Cir. 2004), *Cooper v. Southern Co.*, 390 F.3d 695, 740 (11th Cir. 2004), *Carter v. George Washington University*, 387 F.3d 872, 878 (D.C. 2004). However, some of these circuits do note that knowledge is essential to establishing a causal connection. *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F. 3d 653, 657 (4th Cir. 1998). The only other circuit that has any absolute requirement that the employee establish that the Defendant knows the activity is the Second Circuit. *Feingold v. New York*, 366 F.3d 138, 156 (2nd Cir. 2004).

Petitioner would further state that in the majority of jurisdictions, not only would she have not had to prove as a separate and distinct element that the exercise of the Petitioner's civil rights was known by the individual supervisor who terminated the Petitioner's position, but that a causal connection is allowed to be inferred from the proximity in time between the protected action and the alleged retaliatory actions. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727,731 (9thCir. 1986) *Donnellon v. Fruehauf*

Corp., 794 F.2d 59, 601 (11th Cir. 1986) (Plaintiff was discharged one month after filing a discrimination complaint with the EEOC); *Hochstadt v. Worchester Foundation for Experimental Biology, Inc.*, 425 F.Supp. 318, 324-25 (D.C. Mass 1977), aff'd, 545 F.2d 222 (1st Circuit 1976) (Six month delay could satisfy causation requirement-Knowledge requirement was met by knowledge of Foundation of the Plaintiff's activities.) *O'Bryan v. KTIV Television*, 64 F.3d 1188, 1193 (8th Circuit 1995), (Filing of Plaintiff's administrative complaints and termination three months later "established, at minimum, a genuine issue of material facts on elements of his *prima facie* case.) *O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248, 1253 (10th Circuit 2001) (a causal connection may be shown by "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action.) Citing *Burrus v. United Tel. Co., of Can., Inc.*, 683 F.2d 339, 343 (10th Circuit 1982). *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3rd Circuit 1989) (Causal link established by employer receiving employee's EEOC claim and then firing employee two days later.) *Swanson v. General Services Administration* 110 F 3d 1180, 1188 (5th Cir. 1997) (Close timing between an employee's protected activity and an adverse action against him may provide the "causal connection" required to make out a *prima facie* case of retaliation.) *Hudson v. Norris*, 227 F.3d 1047, 1051 (8th Circuit 2000)(a causal connection established by temporal proximity of four months between

the protected conduct and the adverse employment action with finding that the temporal proximity was significant because of the plaintiff's very good employment record with the employer prior the exercise of the protected activity and within four months following the exercise of this right, plaintiff was ordered to evict a co-habitat from his trailer on the prison grounds, was subjected to two internal affairs investigations, was denied a promotion, and was denied accrued vacation time.)

Even the United States Supreme Court in *Clark County School District v. Breeden,* 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed. 2d 509 (2001), recognized the existence of cases that "accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case" but noted that these cases uniformly hold that temporal proximity must be "very close". *O'Neal v. Ferguson Constr. Co.,* 237 F.3d 1248, 1253 (C.A.10 2001). See, *e.g., Richmond v. ONEOK, Inc.,* 120 F.3d 205, 209 (C.A.10 1997) (3-month period insufficient); *Hughes v. Derwinski,* 967 F.2d 1168, 1174-1175 (C.A.7 1992) (4-month period insufficient).

Petitioner would state that both the District Court and the Sixth Circuit found that the Petitioner was unable to meet the "not onerous" burden of establishing her prima facie case

solely because establishing her prima facie case was dependent upon the testimony of one of her retaliators. This case was lost at the summary judgment stage not because the employer, the Metropolitan Government of Nashville, Davidson County, Tennessee, did not know that the Petitioner was engaging in protected activity. It is obvious from the record that the Employer, through its supervisors and investigators, knew that the Petitioner was engaging in protected activity. The sole issue revolves around the fact that the Employer claims that the individual who actually eliminated the Petitioner's position did not have knowledge that she had engaged in protected activity. The Petitioner does not have evidence other than circumstantial evidence of that individual's knowledge because the Petitioner did not speak directly to Dr. Julie Williams.

Petitioner would state that all savvy employers based upon this knowledge requirement will set up a corporate hierarchy that will allow a company, if it is of the mind to retaliate, to use an individual with whom the Petitioner has not spoken with about her discrimination claim to eliminate the Petitioner's position. Thus, the Petitioner will have no direct knowledge as to what, when or from whom this individual may have received knowledge that the Petitioner was engaging in protected activity. Savvy companies will be able to set up their hierarchies in such a manner to insulate themselves from discrimination lawsuits because the

evidence needed to prove the knowledge prong will solely be in the hands of the Employer and not obtainable by the Petitioner. Petitioner would state that by telling the Petitioner her job had been placed back in the budget for next year, and then eliminating her position four days after engaging in the protected activity should be sufficient evidence to set forth a *prima facie* case of retaliation.

Petitioner would respectfully request that this Honorable Court set forth a standard to be applied in retaliation cases in establishing a *prima facie* case that is not dependent upon evidence that in large measure can only be obtained form the lips of the Defendants.

CONCLUSION

Petitioner respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully Submitted:

Ann Buntin Steiner #11697
THE LAW OFFICES OF STEINER & STEINER
214 Second Avenue North, Ste. 203
Nashville, TN 37201-1644
(615) 244-5063

Attorney for Petitioner,
Dianne B. Proffitt

APPENDIX

6TH CIRCUIT FILINGS:

MIDDLE DISTRICT OF TENNESSEE FILINGS:

Response to Planitiff's Statement of Undisputed Material Facts, filed 07/28/04:

Exhibits to Response:

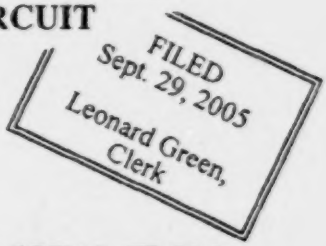
Motion for Summary Judgment,
filed 07/09/04:

Exhibit to Motion:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 04-6355

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT



DIANNE B. PROFFITT, *Plaintiff-Appellant,*	)
v.	) ON APPEAL FROM
METROPOLITAN GOVERNMENT of Nashville and Davidson County, Tennessee, *Defendant-Appellee,*	) THE UNITED STATES) DISTRICT COURT FOR) THE MIDDLE DISTRICT) OF TENNESSEE
Julie Williams, Dr; Pedro Garcia, Dr.; Gene Hughes, Dr., *Defendants.*	)

Before: KENNEDY, COOK, and GRIFFIN, Circuit Judges.

COOK, Circuit Judge. In 2002, Plaintiff-Appellant Dianne Proffitt, and twenty-nine-year employee of the Metropolitan Government of Nashville and Davidson County Board of Education, participated in a sexual harassment investigation. Not long thereafter, she lost her job and though rehired in a different position, suffered a considerable pay

reduction. She sued the Metropolitan Government of Nashville and Davidson County, Tennessee, (the "Metropolitan Government") and Drs. Julie Williams, Pedro Garcia, and Gene Hughes under Title VII of The Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 200 *et seq.*, and the Tennessee Human Rights Act ("THRA"), Tenn. Code Ann. § 4-21-101 *et seq.*, for unlawful retaliation. The district court granted summary judgment to each of the defendants. Proffitt appeals the grant of summary judgment to the Metropolitan Government. For the following reasons, we affirm.

I

Proffitt worked for the Metropolitan Board of Education as a teacher, a principal, and, following her retirement in June 2000, as a part-time employment relations specialist in Human Resources Department. In her final position, she received the same effective wages that she received at the end of her career as a principal, $38.76 per hour, and she also drew her pension.

Dr. Gene Hughes was the director of the Employee Relations Division of the Human Resources Department from August 2001 through the spring of 2003. In late May 2002, the Metropolitan Government initiated an investigation into sexual harassment allegations against him based on information conveyed to one of its attorneys by Tamara Sadler, another employee. Sadler gave an account of inappropriate, sexually-suggestive behavior that included

conduct recounted to her by Proffitt. Proffitt then was interviewed as part of the investigation on June 24, 2002.

On June 3, 2002, just as the Hughes investigation was getting under way, Dr. Julie Williams became assistant superintendent for human resources. Hired in the spring, Dr. Williams had thirty-two years experience in high schools, including sixteen years as an administrator and ten as a principal. She planned to reorganize the Human Resources Department. Soon after her arrival, she asked the directors under her supervision to describe the job responsibilities of each of the employees and requested that each employee complete a form detailing his or her responsibilities. Proffitt completed one of these forms and submitted it to Williams.

Williams ultimately decided to eliminate Proffitt's position, Proffitt was earning $54,000 per year, significantly more than others at her job level, while only working part-time. Williams notified Proffitt of her termination on June 28, 2002, believing (according to her testimony) that she had to provide Proffitt notice before the end of the fiscal year on June 30. Proffitt received the notice four days after her interview in connection with the Hughes investigation.

After her termination, Proffitt obtained work with the summer-school program. She was paid the same $38.76 rate that she had received in the Human Resources Department - though allegedly in error. The chief instructional officer of the Metropolitan Nashville public schools testified that all part-time summer-school employees, whether they were

principals, teachers, or administrators, were to be paid a set rate of $15.04 from sate-extended contract money, and that the person who had offered Proffitt the summer-school position did not have the authority to approve a higher rate. In September 2002, after Proffitt had deposited her final paycheck, Williams stopped payment on the check and sought to verify the hours that Proffitt had worked. Williams ultimately approved Proffitt's hours, but compensated her at the lower rate of $15.04 and sought repayment of the amount that had been overpaid.

On June 30, 2003, Proffitt filed suit, asserting claims of sexual harassment and retaliation in violation of Title VII and the THRA. The Metropolitan Government filed a counterclaim for Proffitt's overpayment. After discovery, the defendant moved for summary judgment and Proffitt moved for summary judgment on the counterclaim. The district court granted summary judgment to the defendant on all counts, dismissed the counterclaim for want of subject-matter jurisdiction and dismissed Proffitt's motion for summary judgment as moot. Proffitt appeals the grant of summary judgment to the Metropolitan Government on the Title VII and THRA retaliation claims.

II

We review the district court's grant of summary judgment de novo. *United Rentals (N.Am.), Inc. V. Keizer*, 355 F.3d 399, 405 (6th Cir. 2004). Summary judgment should

be granted when "the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Summary judgment is appropriate if a party with the burden of persuasion fails to make a showing sufficient to establish an essential element of that party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The familiar McDonnell Douglas burden-shifting framework governs both Title VII and THRA retaliation claims premised on circumstantial evidence. *See Abbott v. Crown Motor Cor., Inc.*, 348 F.ed 537, 542 (6th Cir. 2003); *Miller v. City of Murfreesboro*, 122 S.W.3d 766, 776 (Tenn. Ct. App. 2003). To establish a prima facie case of retaliation, Proffitt must show that: (1) she engaged in activity protected by Title VII; (2) the Metropolitan Government knew that she engaged in the protective activity; (3) the Metropolitan Government subsequently took an employment action adverse to her; and (4) there was casual connection between the protected activity and the adverse employment action. *Abbott*, 348 F.3d at 542. The burden shifts to the Metropolitan Government "to articulate a legitimate, non-retaliatory explanation for the action." *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 563 (6th Cir. 2004). If the Metropolitan Government does so, Proffitt must demonstrate that the proffered explanation is pretextual - either by

showing that it "(1) has not basis in fact, (2) did not actually motivate the [Metropolitan Government's] challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000) (citing *Manzer v. Diamond Shamrock Chemical Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)).

III

We assume, without deciding, that Proffitt's participation in the Hughes investigation constituted "protected activity" for purposes of Title VII. We held in *Abbott* that "Title VII protects an employee's participation in an employer's internal investigation . . . where that investigation occurs pursuant to a *pending* EEOC charge." 348 F.3d at 542 (emphasis added). And, because we reject Proffitt's appeal on alternate grounds, we assume for the sake of argument that the "exceptionally broad protection" of Title VII's participation clause reaches her actions. Id. (quoting *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989)).

Proffitt challenges as unlawful retaliation but her termination and the placement of the stop-payment order on her final paycheck.

A. Proffitt's Termination

The district court correctly granted summary judgment to the Metropolitan Government on Proffitt's claim that her termination constituted unlawful retaliation because Proffitt failed to present evidence sufficient to create a genuine factual issue as to whether Williams knew of Proffitt's protected activity when she terminated her. As this court reiterated in *Mulhall v. Ashcroft*, the decisionmaker's knowledge of the protected activity is an essential element of the prima facie case of unlawful retaliation. 287 F.3d 542, 552 (6th Cir. 2002). We noted that "[i]n most Title VII retaliation cases, the plaintiff will be able to produce direct evidence that the decision making officials knew of the plaintiff's protected activity," because "the adverse action will be taken by the same supervisor to whom the plaintiff has made complaint in the past." *Id.* at 552. But "direct evidence of such knowledge or awareness is not required, and . . . a plaintiff may survive summary judgment by producing circumstantial evidence to establish this element of her claim." *Id.; see, e.g., Allen v. Mich. Dep't of Corr.*, 165 F.3d 405, 413 (6th Cir. 1999) (finding a sufficient circumstantial case for knowledge of plaintiff's protected activity where plaintiff was the only one of several similarly-situated black officers to receive remedial action); *Polk v. Yellow Freight System, Inc.*, 876 F.2d 527, 531 (6th Cir. 1989) (finding a sufficient circumstantial case for knowledge where defendant told plaintiff, "I know where you've been," after plaintiff

returned from the state civil rights department). Where the decisionmaker denies having knowledge of the alleged protected activity, the plaintiff must do more than "offer [] only conspiratorial theories . . . or 'flight of fancy, speculations, hunches intuitions, or rumors." *Mulhall*, 287 F.3d at 552 (quoting *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir. 1991) (en banc)).

Williams testified that she did not know of Proffitt's participation in the Hughes investigation when she terminated Proffitt on June 28, 2002, and notes from a meeting two days later with the person investigating Hughes - stating, "Proffitt termination mid-investigation/did not know about investigation" - corroborate her testimony. Proffitt offers not direct evidence of William's knowledge in rebuttal. Instead, she relies on a string of inferences - that Hughes suspected Proffitt to be witness in the investigation and *may have told* Williams's supervisor of that suspicion; that Williams's supervisor, upon hearing this, *may have warned* Williams not to retaliate against Proffitt; and that Williams's supervisor, in doing so, *may have informed* Williams of Proffitt's protected activity. We find Proffitt's evidence too speculative to support the inference that Williams knew of her protected activity when she terminated her.

B. Stop-Payment Order on Proffitt's Final Paycheck

The district court also correctly granted summary judgment on Proffitt's claim that the placement of the stop-

payment order on her final summer-school paycheck constituted unlawful retaliation. Williams was told about Proffitt's participation in the Hughes investigation on June 30, 2002, so she knew about the protected activity when she stopped Proffitt's paycheck in September. And we assume, without deciding, that Proffitt sufficiently demonstrated a "casual connection" between her protected activity and the stop-payment order to establish prima facie case of retaliation. We nonetheless affirm the district court's judgment because the Metropolitan Government put forth a legitimate, non-retaliatory explanation for its action, and Proffitt offered no evidence to pretext.

Williams averred that she stopped payment on Proffitt's check to audit Proffitt's calculation of hours and to determine why Proffitt had billed at a rate more than double the rate approved for summer-school employees. Proffitt responds that she was historically paid $38.76 per hour for her summer-school work, and that, in the opinion of the vice president of the teacher's union, Proffitt's wages should not have been limited to $15.04 per hour. Neither piece of evidence, however, rebuts the testimony of the chief instructional officer of the Metropolitan Nashville public schools that the part-time summer-school employees ware to be paid a set rate of $15.04. And neither suggest that Williams's proffered explanation for her action laced a basis in fact, did not actually motivate Williams's conduct, or was insufficient to warrant Williams's conduct. *See Dews*, 231

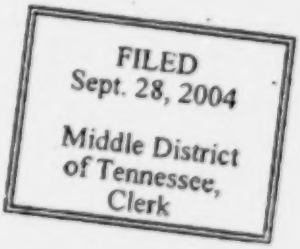
F.3d at 1021. We conclude that the district court correctly found no triable issue as to whether the Metropolitan Government's explanation for its conduct was pretextual and correctly granted summary judgment to the Metropolitan Government on Proffitt's claim that the placement of the stop-payment order constituted unlawful retaliation.

IV

We thus affirm the district court's grant of summary judgment to the Metropolitan Government.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DIANNE B. PROFFITT *Plaintiff,*	)	
v.	)	**Case No. 3:03-0587**
	)	**Case No. 3:03-1167**
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA, *Defendants.*	)	**Judge Trauger** **Magistrate Judge Brown**



ORDER

For the reasons expressed in the accompanying Memorandum, the Motion for Summary Judgment of defendant Dr. Gene Hughes (Docket No. 64) is **GRANTED**, and all claims against him are hereby **DISMISSED**. The Motion for Summary Judgment of defendants Dr. Pedro Garcia, Dr. Julie Williams, and the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metropolitan Government") (Docket No. 69) is **GRANTED**, and all claims against these defendants are hereby **DISMISSED**.

The permissive counterclaim filed by defendant Garcia, Williams, and Metropolitan Government is **DISMISSED** for lack

of subject matter jurisdiction, and plaintiff's Motion for Summary Judgment (Docket No. 72) is accordingly **DENIED AS MOOT**. The Motion to Strike Plaintiff's Statement of Additional Material Facts and Motion to Strike Affidavits filed by defendant Garcia, Williams, and Metropolitan Government (Docket No. 87) is **DENIED**.

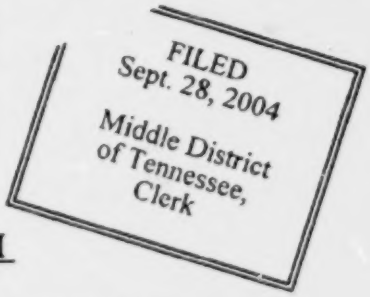
It is so ordered.

Entered this 28th day of September 2004.

/s/ Aleta A. Trauger
ALETA A. ATRAUGER
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DIANNE B. PROFFITT *Plaintiff,*	)	
v.	)	**Case No. 3:03-0587**
	)	**Case No. 3:03-1167**
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA, *Defendants.*	)	**Judge Trauger** **Magistrate Judge Brown**



MEMORANDUM

Pending before the court is the Motion for Summary Judgment of defendant Dr. Gene Hughes (Docket No. 64), to which plaintiff Dianne B. Proffitt has responded (Docket No. 81), and Hughes has replied (Docket No. 90). Also pending is the Motion for Summary Judgment of defendants Dr. Pedro Garcia, Dr. Julie Williams, and the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metropolitan Government") (Docket No. 69), to which Proffitt has responded (Docket No. 83), and defendants have replied (Docket No. 94). Also pending is the Motion for Summary Judgment of the plaintiff (Docket No. 72), to which

defendants Garcia, Williams, and the Metropolitan Government have responded (Docket No. 79), and plaintiff has replied (Docket No. 92). Defendants Garcia, Williams, and the Metropolitan Government have also filed a Motion to Strike Plaintiff's Statement of Additional Material Facts and Motion to Strike Affidavits (Docket No. 87), to which the plaintiff has responded (Docket No. 96).

Factual Background and Procedural History[1]

Defendant Metropolitan Government is a governmental entity operating the public school system in Nashville in Davidson County, Tennessee. (Docket No.1, Complaint ¶ 2.) The three individual defendants all presently hold or formerly held positions with the public school system of the Metropolitan Government - Dr. Julie Williams was formerly the Assistant Superintendent for Human Resources

---

[1]Unless otherwise noted, the facts are drawn from the Complaint (Docket No.1, as amended at Docket No. 24), the Answer and Counterclaim of the Metropolitan Government, Garcia, and Williams (Docket No.9), the Answer of Dr. Gene Hughes (Docket No. 10), the plaintiff's response to Statement of Material Facts Not in Dispute filed by the Metropolitan Government, Garcia, and Williams (Docket No. 84), and Plaintiff's Response to the Defendant, Gene Hughes' Statement of Undisputed Material Facts (Docket No. 82).

(from June 3, 2002 through July 1, 2003), Dr. Pedro Garcia is the Director of Schools (appointed July 2001), and Dr. Gene Hughes was formerly the Director of the Employee Relations Division of the Human Resources Department for the Metropolitan Nashville Public Schools (from August 2001 through spring 2003). Plaintiff Dianne B. Proffitt is a citizen and resident of Chapmansboro in Cheatham County, Tennessee, and a former employee of the Metropolitan Nashville public school system who served for 29 years as a teacher and principal.

In November 1999, plaintiff stopped working as a principal, due to health problems, and began to work part-time in the Employee Relations Division of the Human Resources Department for the Metropolitan Nashville Public Schools while still officially employed as a principal. Effective June 30, 2000, Proffitt retired and, importantly, under a prior Director of Schools and a prior Assistant Superintendent for Human Resources, she entered into an arrangement under which she worked part-time as an Employee Relations Specialist in the Human Resources Department. Under this arraignment, Proffitt received the same effective hourly rate of pay she had been receiving at the end of her 29-year career, which was $38.76 per hour, and she also drew her pension.

In late May 2002, the Metropolitan Government initiated an investigation into sexual harassment allegations against Hughes based on information conveyed to Jennifer

Bozeman, an attorney for the Metropolitan Government, by Tamara Sadler, the former Director of the Employee Relations Department who had been demoted to an administrative assistant. Bozeman testified that allegations of inappropriate, sexually suggestive behavior by Hughes had been recounted to Sadler by Proffitt. (Docket No. 83, Attachment, Ex. 15, Deposition of Jennifer Bozeman at 33.) Because Hughes was the head of the department that would normally investigate such complaints in the public school system, Veronica Frazier, Assistant Director of Human Resources for the Metropolitan Government Human Resources Department (or "big Metro," not the school system), conducted the investigation. (Docket No. 69. Ex. G, Affidavit of Veronica Frazier ¶¶ 2, 3.)

On June 24, 2002, Frazier interviewed the plaintiff as part of the Hughes investigation. Proffitt asserts that she had been contacted by Frazier on June 17, 2002 to set up an appointment about general concerns and that it was not until she met with Frazier on June 24, 2002 that she learned the nature and subject of the investigation. (Docket No. 83, Attachment, Ex. 8, Affidavit of Dianne Proffitt ¶¶ 12, 13.) Proffitt asserts that she told Frazier she feared she would lose her job if she participated in the investigation, but that she was assured by Frazier this would not happen. *Id.* at, ¶ 13. Proffitt told Frazier that Hughes would often use the phrase "bite me," would engage in inappropriate gesturing, and would say that Proffitt "just wanted to get close to his body"

when she would attempt to use the fax machine in his office. (Docket No. 83, Attachment, Ex. 8, Proffitt Aff. ¶ 14.)

Frazier confirms that Proffitt recounted complaints about Hughes's inappropriate language and gesturing in their June 24, 2002 meeting. (Docket No. 80, Ex. B, Deposition of Veronica Thompson Frazier at 49.) These allegations were ultimately included in Frazier's fact-finding report, released on September 13, 2002, in which Frazier detailed "some concerns regarding Dr. Hughes' participation in inappropriate and unprofessional behavior and communication" relayed by a number of school system employees, but "found no evidence to substantiate a sexual harassment claim." (Docket No. 69, Ex. G, Frazier Aff., Ex. 2 ¶¶ 3, 7.) Dianne Proffitt was listed as one of the participating witnesses, although no specific allegations were directly attributed to her.

Meanwhile, Dr. Julie Williams had assumed her new position as Assistant Superintendent for Human Resources of the school system on June 3, 2002. When Garcia asked her to assume this position, Williams had worked for thirty-two years in high schools, including as an administrator for sixteen years, and as the principal of Hunters Lane High School for the prior ten years (where she had been named State Principal of the Year in 2002). (Docket No. 69; Ex. E, Deposition of Dr. Julie Cassandra Brown Williams at 8-9.) She arrived in a Human Resources Department where "[t]here were a lot of issues ... that were not going well" and testified that she came in "under some unique kinds of situations. It

wasn't a pleasant situation." *Id.* at 44, 59. Among the most important tasks that Garcia wanted her to accomplish when she took over was to "clean up" the process for criminal background checks on employees. *Id.* at 47. She also planned to reorganize the department because she "already knew some of the problems that were coming up." *Id.* at 57. To this end, Williams asked all the directors under her supervision, including Hughes, what all of their employees did, and also had each employee in the department complete a form detailing their job duties and responsibilities. *Id.* Proffitt confirmed that she filled out such a form, and that she asked Hughes, as her supervisor, to review it for accuracy. (Docket No. 69, Ex. A, Deposition of Dianne B. Proffitt at 5-6.) Proffitt testified that, when she turned in the form to Williams, Williams told her that she had put Proffitt in the upcoming year's budget for two to three days a week, *id.* at 6; however, Williams denies telling the plaintiff there was money in the budget for her and testified that she merely agreed, in a noncommittal manner, that she hoped Proffitt could stay in the job. (Docket No. 69, Ex. E, Williams Dep. at 62.) This conversation appears to have occurred in the middle of June. *Id.* at 59.

Williams prepared several drafts of a proposed reorganization plan and discussed the reorganization in general meetings with the directors and coordinators under her supervision, asking them if it would work, and changing the plan over time "to try to get the best help that we could."

Id. at 60. "Lots of positions," not just the plaintiff's, were discussed in group meetings that Williams held, and, pursuant to the reorganization, there was a redistribution of "a lot of job duties." *Id.*. at 61, 62.

According to Williams, Proffitt's position was a logical one to consider for elimination. The plaintiff was working part-time and making $54,000 - "just mathematics" made it reasonable to look at her position. *Id.* at 67. It was the "general feeling" in, a meeting Williams had with her directors that the plaintiff made too much money in the job. *Id.* at 95. A version of the 2002-2003 Fiscal Year Organization Plan indicates that Proffitt was being paid at a salary grade of 15 in the 2001-2002 fiscal year, while all other employees not directors or coordinators were being paid at a salary grade not higher than 9. (Docket No. 83, Attachment, Ex. 22.)

On June 28, 2002, Williams phoned Proffitt to tell her that her position had been eliminated. *Id.* at 69. She testified that she notified the plaintiff on this date because she believed that she had to do so before the fiscal year ended on June 30, 2002. *Id.* Williams confirmed this conversation by a letter dated July 9, 2002, which she copied to Garcia and Hughes. (Docket No. 69, Ex. F.) Williams testified that she did not "dismiss" the plaintiff; instead, she told her that she did not need her at that point in time and would call her when she needed her. (Docket No. 69, Ex. E, Williams Dep. at 68.) Williams knew that, to a certain extent, the work in Human

Resources was seasonal; this was a factor she had considered in the reorganization. *Id.* She testified that it did not occur to her to offer to let the plaintiff, a professional person, keep her job in Human Resources, which was a support position, at a lower rate of pay, although she would have considered this option had the plaintiff mentioned it. (Docket No. 69, Ex. E, Williams Dep. at 67.)

Williams claims that she eliminated Proffitt's position because the plaintiff was a part-time employee making $54,000, and she estimated that she could achieve a substantial savings by hiring a full-time person to do more work than Proffitt was doing for a lesser amount of money. *Id.* at 67. In contemplating the decision to eliminate Proffitt's position, she notified Hughes and Garcia. *Id.* at 57, 58. As noted above, she asked Hughes what Proffitt did in the department, and Hughes told her that she "helped out with the Teacher of the Year and other little things that he managed - that he asked her to do." *Id.* at 58. Closer to the time she asked Proffitt to leave, Williams called Garcia and asked if there was any reason to keep Proffitt on the payroll. *Id.* He responded, "Who is Dianne Proffitt?" and then told her to do what she needed to do. *Id.* Williams testified that Proffitt's position was not eliminated because of what Hughes told her about plaintiff's job duties and that the decision was made by Williams alone. *Id.* at 53-54, 58.

After being told that her position in the Human Resources Department had been eliminated, Proffitt contacted

Emily Stinson of Learning Support Services (who administered the summer school program) to ask if she should complete work on the summer school projects she had begun. (Docket No. 69, Ex. A, Proffitt Dep. at 30.) Stinson replied that Proffitt should continue working on summer school and that there was money in the summer school account to cover her wages. (Docket No. 64, Appendix, Ex. 8, Deposition of Emily Stinson at 54-55.) The plaintiff asserts that she told Stinson that Williams had informed her that "she no longer needed [Proffitt's] services, and there was not money in the budget." (Docket No. 69, Ex. A, Proffitt : Dep. at 30.) Stinson testified that she did not know that Williams had told Proffitt that her services were no longer needed at Employee Relations. (Docket No. 64, Appendix, Ex. 8, Stinson Dep. at 54-55.) She was aware that Proffitt had "finished the contract that she had on June 30th" and that her salary would have stopped as of that date, but because she needed Proffitt's services and had money to pay her in the summer school account, she asked Proffitt to work for her. *Id.* at 54, 55. Stinson paid Proffitt the same rate of pay she had been receiving previously because the plaintiff was continuing work she had previously done, and Stinson assumed it was proper to keep her at that rate. *Id.* at 27, 56. While Proffitt worked for Stinson on the summer school project, Stinson signed Proffitt's timesheets, which she had not done before.

In September 2002, Williams first learned that Proffitt was still working in the school system when an employee

informed her of timesheet discrepancies in what turned out to be Proffitt's timesheets. Proffitt had submitted two payroll sheets claiming time for the same dates. (Docket No. 69, Ex. E, Williams Dep. at 71, 72.) Williams also discovered that Proffitt was being paid over $38 per hour for work on summer school, while all other summer school employees were making $15.04 per hour, and that Proffitt had claimed time worked on Saturdays and Sundays. *Id.* at 95, 96. She brought these facts to the attention of Dr. Sandra Dell Johnson, Chief Instructional Officer and second in command at the Metropolitan Nashville Public Schools. (Docket No. 69, Ex. E, Williams Dep. at 95, 96; Docket No. 80, Ex. D, Deposition of Sandra Dell Johnson at 7, 12, 22, 26, 27-28.) Johnson testified that all summer school employees, whether they were principals, teachers, or administrators, were to be paid a set rate of $15.04 from state-extended contract money, and that Stinson, an entry-level administrator at the district office, did not have the authority to hire an employee at a rate higher than the authorized rate. *Id.* at 14, 18, 47, 51, 54, 80.

On September 4 or 5, 2002, Williams contacted Proffitt by phone to tell her that she had stopped payment on Proffitt's paycheck in the amount of $4,322.45 due to apparent timesheet discrepancies and possible double billing. (Docket No. 69, Ex. E, Williams Dep. at 73-74; Docket No. 83, Attachment, Ex. 8, Proffitt Aff. ¶ 37; Docket No. 69, Ex. I.) Williams sent Proffitt letters on September 18, 2002 and October 11, 2002 detailing how Proffitt had been overpaid for

work performed since July 1, 2002 and requesting repayment. (Docket No. 69, Ex. K, Ex. L.)

Proffitt asserts that the general practice within the school system is to hire retirees who wish to work over candidates who had not worked for the school system previously. (Docket No. 83, Ex. 8, Proffitt Aff. ¶ 45; Ex. 13, Affidavit of Jamye Marie Merritt ¶ 10.) She states that, after her position was eliminated, Tracy Burnett, who had not been a prior employee of the school system, was hired by the Employee Relations Division of the Human Resources Department to work part-time on the Teacher of the Year project. (Docket No. 83. Ex. 8. Proffitt Aff. ¶ 45; Ex. 13, Merritt A.ff. ¶ 10.) Proffitt was not asked to return to do this work, although she asserts that she would have done the work if asked. (Docket No. 83, Ex. 8, Proffitt Aff. ¶ 45.) She also asserts that her hourly rate of pay was reduced after she had performed the work. *Id.* at ¶¶ 37, 38.

On June 30, 2003, Proffitt filed suit in this court against the Metropolitan Government, Williams, Hughes, and Garcia, asserting claims of sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 ("THRA"). Hughes filed an Answer to the Complaint. (Docket No. 10.) The Metropolitan Government; Williams, and Garcia also filed an Answer and asserted a counterclaim in which they alleged that Proffitt owes the Metropolitan Government in

excess of $500 as a result of overpayment for work performed for the school administration in the summer of 2002. (Docket No.9 ¶ 21.) The plaintiff filed a Motion to Amend the Complaint (Docket No. 24), which the court granted. (Docket No. 38.) Defendants filed Motions to Dismiss for failure to state a claim (Docket Nos. 11, 14), which the court granted in part and denied in part. (Docket No. 38.) On December 3, 2003, the plaintiff filed an independent action against the Metropolitan Government, Williams, and Garcia alleging retaliation in violation of Title VII and the THRA by virtue of these defendants' filing ofa countersuit. On February 27,2004, the court consolidated this case, Case No. 3:03-1167, with the instant, earlier-filed action. (Docket No. 41.) The court later ordered plaintiff's Title VII sexual harassment claim against the Metropolitan Government dismissed (Docket No. 43), and plaintiff's Title VII retaliation claim against Garcia and Williams, asserted in Case No. 3:03-1167, dismissed. Thus, the remaining claims by the plaintiff are THRA retaliation claims against Hughes, Garcia, and Williams; retaliation claims against the Metropolitan Govenunent under Title VII and the THRA; and a sexual harassment claim against the Metropolitan Government under the THRA. Summary judgment is sought by the defendants on all claims, and the plaintiff has also moved for summary judgment With respect to the counterclaim.

Discussion

I. Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R Civ. P. 56(c). To prevail, the movmg party must meet the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). In determining whether the moving party has met its burden, the court must view the factual evidence and draw reasonable inferences in the light most favorable to the nonmoving party. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *McLean v. Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). "The court's function is not to weigh the evidence and determine the truth of the matters asserted, 'but to determine whether there is a genuine issue for trial.'" *Little Caesar Enters., Inc. v. OPPCO, LLC*, 219 F.3d 547, 551 (6th Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). If the nonmoving party, however, fails to make a sufficient showing on an essential element of the case with respect to which the nonmoving party has theo burden, the moving party

is entitled to summary judgment as a matter of law. See *Williams v. Ford Motor Co.*, 187 F.3d 533, 537-538 (6th Cir. 1999).

To preclude summary judgment, the nonmoving party "is required to present some significant probative evidence that makes it necessary to resolve the parties' differing versions of the dispute at trial." *Gaines v. Runyon*, 107 F.3d 1171, 1174-75 (6th Cir. 1997). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 566 (6th Cir. 2003) (quoting *Anderson*, 477 U.S. at 252). The nonmoving party must show that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. To determine whether the nonmoving party has raised a genuine issue of material fact, the evidence of the nonmoving party is to be believed and all justifiable inferences drawn in his favor. *Id.* at 255.

The court should also consider whether the evidence presents "a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Amway Distribs. Benefits Ass'n v. Northfield Ins. Co.*, 323 F.3d 386, 390 (6th Cir. 2003) (quoting *Anderson*, 477 U.S. at 251-52). "There is no genuine issue for trial unless the nonmoving party has produced enough evidence for a jury to be able to return a

verdict for that party." *Tinsley v. General Motors Corp.*, 227 F.3d 700, 703 (6th Cir. 2000). If the evidence offered by the nonmoving party is "merely colorable," or "is not significantly probative," or enough to lead a fair-minded jury to find for the nonmoving party, the motion for summary judgment should be granted. *Anderson*, 477 U.S. at 249-52. "A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." *Hill v. White*, 190 F.3d 427, 430 (6th Cir. 1999) (citations omitted).

II. Analysis

A. Plaintiffs Claims of Retaliation by the Metropolitan Government

Proffitt alleges that the Metropolitan Government retaliated against her in violation of Title VII and the THRA because of her truthful participation in the sexual harassment investigation of Gene Hughes. (Docket No. 1 ¶¶ 16, 20.) Title VII provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this

subchapter." 42 U.S.C. § 2000e-3(a) (2004). The THRA contains a substantially similar provision.[2]

Whether a claim is brought under Title VII or the THRA, if a plaintiff has only circumstantial evidence of retaliation, under the *McDonnell Douglas* burden-shifting framework, she must first establish a *prima facie* case of retaliation by showing: (1) that the plaintiff engaged in an activity protected by the statute; (2) that the defendant knew that the plaintiff had engaged in the protected activity; (3) that the defendant thereafter took an employment action adverse to the plaintiff; and (4) that a causal connection exists between the protected activity and the adverse employment action. *See Abbott v. Crown Motor Co.*, 348 F.3.d 537, 542 (6th Cir. 2003); *Austin v. Shelby County Gov't*, 3 S.W.3d 474, 480 (Tenn. Ct. App. 1999); see also *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 463, 464 (6th Cir. 2001); *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000). If the plaintiff satisfies this burden, the burden of production shifts

---

[2]The THRA states that it is a discriminatory practice to "[r]etaliate or discriminate in any manner against a person because such person has opposed a practice declared discriminatory by this chapter or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing under this chapter." Tenn. Code Ann. § 4-21-301(1) (2004).

to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action, after which the plaintiff must demonstrate that the proffered reason was mere pretext. *Abbott*, 348 F.3d at 542; *Miller v. City of Murfreesboro*, 122 S.W.3d 766, 776 (Tenn. Ct. App. 2003). Under Sixth Circuit precedent, a plaintiff may establish pretext by showing that (1) the proffered reasons had no basis in fact, (2) the proffered reasons did not actually motivate the employer's adverse action, or (3) the proffered reasons were insufficient to motivate the adverse action. *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 463 (6th Cir. 2003); *Manzer v. Diamond Shamrock Chems.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

For purposes of this motion the Metropolitan Government concedes that the plaintiff engaged in protected activity when she spoke to Veronica Frazier on June 24, 2002 (thereby participating in the investigation of sexual harassment complaints against Gene Hughes). (Docket No. 70 at 14.) Thus, the defendant concedes that Proffitt has established the first prong of her *prima facie* case with respect to all four alleged instances of retaliation.[3] However, the

---

[3]Although the Metropolitan Government concedes that the plaintiff engaged in a protected activity by her June 24, 2002 participation in the investigation of Hughes, it is not entirely clear that the plaintiff did engage in an activity protected under statute. The Sixth Circuit has recently held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful

Metropolitan Government asserts that; with respect to all alleged instances of retaliation, Proffitt is either unable to establish all elements of her *prima facie* case or is unable to offer sufficient evidence to suggest that the defendant's legitimate, nondiscriminatory reasons for its adverse employment actions were pretextual. *Id.*

1. Williams's June 28, 2002 Elimination of Proffitt's Position

Proffitt asserts that the Metropolitan Government retaliated against her when Williams called her on June 28, 2002 - four days after she participated in Frazier's investigation of Gene Hughes - to eliminate her position, telling her not to report to work any longer because there was no money for her in the budget. The defendant asserts that, because Proffitt has no evidence that Frazier talked to Williams, Hughes, or Garcia during this period about what plaintiff had said during the investigation, she is unable to

---

discrimination where that investigation occurs pursuant to *a pending EEOC charge*." *Abbott*, 348 F.3d at 543 (emphasis added). The record does not reveal that the Hughes investigation occurred pursuant to such a pending charge. However, given the "exceptionally broad protection' of the participation clause," *id.*, and the fact that the defendant does not challenge this element of the *prima facie* case, the court will deem it to have been established.

establish that the defendant had the knowledge required to make out a *prima facie* case of retaliation. The defendant also argues that there can be no causal connection between the protected activity and the termination because plaintiff is unable to make out the knowledge element.

The Sixth Circuit has observed that, in most retaliation cases, the plaintiff will have direct evidence that the decision making officials knew of the plaintiff's protected activity, particularly because, in many cases, "the adverse action will be taken by the same supervisor to whom the plaintiff has made complaints in the past." *Mulhall v. Ashcroft*, 287 F.3d 543, 552 (6th Cir. 2003). Nonetheless, direct evidence of the decision making official's knowledge is not strictly required, and a plaintiff can survive summary judgment by adducing sufficient circumstantial evidence to establish this element of the *prima facie* case. *See id.; Peterson v. Dialysis Clinic, Inc.*, No. 96-6093, 1997 U.S. App. LEXIS 26254, at *12 (6th Cir. Sept. 18, 1997). Courts considering circumstantial evidence of knowledge are cautioned to credit such evidence only when it would be reasonable, as opposed to speculative, for a factfinder to conclude from it that the decision making official had the requisite knowledge. *See Felts v. Campbell*, No. 96-6729, 1998 U.S. App. LEXIS 479, at * (6th Cir. Jan. 7, 1998) (finding circumstantial evidence to be too speculative for the district court to have properly relied on it); *Peterson*, 1997 U.S. App. LEXIS 26254, at *11 (finding that

circumstantial evidence of knowledge and causation permitted only speculation, not reasonable inference).

In *Mulhall*, the Sixth Circuit, in analyzing whether a defendant accused of retaliation could be deemed to have knowledge that the plaintiff's name was on the witness list of a sworn statement, declined to credit the plaintiff's circumstantial evidence of the defendant's knowledge. *Mulhall*, 287 F.3d at 553-54. In the face of a sworn denial by the chief counsel that he had seen the plaintiff's name on the witness list, the plaintiff attempted to establish knowledge by highlighting the counsel's credibility problems and inconsistent statements, and asked the court to infer that this individual had shared the fact of plaintiff's participation with decision making officials, despite a complete lack of direct or circumstantial evidence of such interaction other than the adverse action itself. *Id.* The court found that none of the inconsistencies led to the conclusion that the counsel knew that the plaintiff was on the list or that he had informed the decision making officials of this fact. *Id.* at 554.

The Sixth Circuit in *Mulhall* distinguished the facts of that case from prior precedent, both in the Sixth Circuit and outside it, where circumstantial evidence was sufficient to establish knowledge. For instance, in one case, a defendant was deemed to have knowledge that a grievance had been filed when he took remedial action in response to the plaintiff's filing of a grievance prior to taking adverse action. *Mulhall*, 287 F.3d at 552-53 (citing *Allen v. Mich. Dep't of*

Corr., 165 F.3d 405,413 (6th Cir. 1999)). In another case, a supervisor told a plaintiff, who had just been to inquire into her rights at the state commission, that she knew where the plaintiff had been, a comment from which a jury could reasonably infer that the supervisor knew of the protected activity. *Mulhall*, 287 F.34 at 553 (citing *Polk v. Yellow Freight Sys., Inc.*, 876 F.2d 527, 531 (6th Cir. 1989)). In a final case, a district court found that knowledge of a plaintiff's protected activity could be inferred from evidence ofthe prior interaction of one official with knowledge and another official who actually engaged in the adverse action (although there was no evidence that the second, decision making official himself had knowledge) when the first official had also participated in drafting the charges against the plaintiff that led to her discharge. *Mulhall*, 287 F.3d at 553-54 (citing *Kralowec v. Prince Georges County, Maryland*, 503 F. Supp. 985 (D. Md. 1980), *aff'd* 679 F.2d 883 (4th Cir.), *cert. denied*, 459 U.S. 872 (1982)).

In the case at bar, the plaintiff asserts that Garcia, Williams, and Hughes all knew of the protected activity prior to the elimination of her position. (Docket No. 83 at 19.) In support of this claim, she cites testimony of Frazier, who recounted an initial meeting with Garcia, Bozeman, and Hughes in which she detailed the plan for the Hughes investigation and stated that no retaliatory action should be

taken against participating witnesses.[4] (Docket No; 80, Ex. B, Frazier Dep.at 26, 30.) Frazier testified that she may have mentioned Proffitt by name at this time as a potential witness, but she cannot recall for certain. *Id.* at 27.

---

[4]The court is unable to discern the exact date of this meeting, but it likely occurred within one week prior to June 12, 2002 (when Bozeman and Sadler discussed the investigation at an unrelated court appearance). (Docket No. 83, Attachment, Ex. 7, Sadler Aff. ¶ 6.) In her affidavit, Sadler indicates that she was contacted by Frazier about the investigation "[w]ithin a day or two prior to June 12, 2002." *Id.* at ¶ 5. Frazier testified that in the initial meeting, she stated that the procedure would be to "interview the folks and given them a fact-finding report at the conclusion of our investigation" and that Sadler, as the complaining party, was "one of the first people interviewed." (Docket No. 80, Ex. B, Frazier Dep. at 31-32.) Logically, then, Frazier contacted Sadler relatively soon after the initial meeting, and because she contacted Sadler within a day or two prior to June 12, the initial meeting would likely have occurred a few days before that date. The court notes that Sadler and Bozeman differ on the date of their initial discussion that sparked the investigation - Bozeman testifies that occurred in mid-May 2002 (which is supported by Frazier's assertion that she initiated the investigation in May 2002), while Sadler's affidavit indicates that her first conversation with Bozeman occurred approximately one week before June 12, 2002. (Docket No. 94, Ex. B, Bozeman Dep. at 52; Docket No. 69, Ex. G, Frazier Aff. ¶ 3; Docket No. 83, Attachment, Ex. 7, Sadler Aff. ¶ 4.)

Garcia's testimony on this point conflicts with Frazier's - he asserts that Hughes was not present at this initial meeting (that he spoke to Hughes about the investigation personally after the meeting with Frazier) and that no individuals were specifically named as witnesses in the meeting.[5] (Docket No. 69, Ex. D, Garcia Dep. at 74, 75, 76.) Garcia testified that, when he went to notify Hughes of the investigation, Hughes indicated that he thought the investigation concerned Tamara Sadler and Vicky Crawford. *Id.* at 76. Garcia acknowledged that he would have warned Hughes about retaliating against Crawford and Sadler and that, if he had been informed that Proffitt was part of the investigation (which he claims he was not),[6] he also would have informed Hughes not to retaliate against her. *Id.* at 94. Garcia also testified that he notified Williams of the investigation and, although he cannot recall the specifics of the conversation, it would also have been Garcia's normal

---

[5]Jennnifer Bozeman testified that the meeting consisted of herself, Garcia, Frazier, Hughes, and Mike Safley (another attorney in the Metropolitan Government). (Docket No. 94, Ex. B, Bozeman Dep. at 65.)

[6]Garcia's claimed lack of knowledge of Proffitt's role in the investigation is substantiated by Williams's testimony, recounted earlier, that, when she asked Garcia about eliminating Proffitt's position, he did not know who she was. (Docket No. 69, Ex. E, Williams Dep. at 58.)

procedure to warn Williams, as Hughes's direct supervisor, of potential retaliation against participating witnesses. *Id.* at 95-96. Williams, for her part, testified that, when she terminated Proffitt, she was "unaware of what was going on with -- with the Hughes suit" (Docket No. 69, Ex. E, Williams Dep. at 53.)

The plaintiff cites an excerpt from Hughes's testimony, devoid of context,[7] for the proposition that he knew "early on" that Sadler and Proffitt were "suspects," but the portion cited merely establishes that, prior to the complaint of sexual harassment, Hughes believed that Sadler, Proffitt, and Crawford were seeking "revenge" on Hughes. (Docket No. 83, Attachment, Ex. 3, Deposition of Gene Patrick Hughes at 86.) Proffitt asserts that, together, this evidence shows that Hughes knew that Proffitt and Sadler were "suspects," that Hughes told Garcia these individuals' names, and that Garcia passed this information on to Williams.

With respect to the elimination of Proffitt's position, Williams was the decision making official. It was her reorganization plan that eliminated Proffitt's job, her cost estimates that deemed it efficient to redistribute the duties or find a lower-paid replacement to Proffitt, and her

---

[7]Neither the plaintiff nor any of the defendants has provided the court with a copy of the entire Hughes deposition. Only excerpts of his deposition testimony have been filed .

communication with Proffitt, on June 28 and July 9, 2002, that accomplished the task. She explicitly states that the decision to eliminate Proffitt's position was "mine and mine alone. I take full responsibility for Dianne Proffitt." (Docket No. 69, Ex. E, Williams Dep. at 53-54.) The plaintiff has no direct evidence that Williams knew she had participated in the Hughes investigation when Williams terminated her on June 28, 2002. Moreover, Williams flatly denies it, testifying that she learned of the Hughes investigation for the first time when she was interviewed by Frazier on July 30, 2002.[8] (Docket No. 69, Ex. E, Williams Dep. at 24, 25.) Investigative notes taken by Frazier during her July 30, 2002 discussion with Williams corroborate Williams's testimony, stating "'Proffitt termination mid-investigation/did not know about investigation." (Docket No. 83, Attachment, Ex. 17, Metro Investigative Notes, Dr. Julie Williams, July 30,2002.)

In an attempt to establish that Williams had knowledge, the plaintiff relies on a string of inferences - the possibility that Hughes told Garcia the names of Proffitt and Sadler as "suspects" in the investigation, linked to an

---

[8]On July 30, 2002, Frazier told Williams the names of some witnesses in the investigation, including Proffitt, but did not indicate whether they were witnesses for or against Hughes. *Id.* at 26-27. Williams met with Hughes some time after July 30 and discussed with him "general behavior" that "he should not engage in," but did not tell him names of people involved in the investigation as relayed to her by Frazier. *Id.* at 29, 30.

assumption that, had Garcia known the names of these potential witnesses in the investigation (such as from Hughes), he would have warned Williams, by name, not to retaliate against them. Even in the best light, these inferences would not establish that any of the parties knew of Proffitt's actual June 24,2002 participation in the investigation prior to June 28, 2002. Plaintiff presents no evidence whatsoever that the parties were made aware of plaintiff's discussion with Frazier; instead, she relies on their "knowledge"of her *potential* participation in the investigation, as outlined by Frazier in the initial meeting. In fact, Proffitt herself did not know until June 24, 2002 about the Hughes investigation, nor did she participate in any manner in the investigation until that date.[9] In the face of William's bald denial that she knew of the Hughes investigation prior to July 30, 2002, this chain of inferences amounts to nothing more than speculation and

---

[9]In her affidavit, plaintiff states that, "on June 17, 2002, Veronica Frazier contacted me wanting to speak with me about some concerns but did not go into detail." (Docket No. 83, Attachment, Ex. 8, Affidavit of Dianne Proffitt ¶ 12.) Plaintiff's affidavit establishes that it was only when she went to the appointment with Frazier, on June 24, 2002, that she learned that Frazier was investigating a sexual harassment claim and that the subject of the investigation was Gene Hughes. *Id.* at ¶ 13. It was only during that meeting that she agreed to participate in the investigation and that she disclosed Hughes's inappropriate behavior towards her. *Id.* at ¶¶ 13, 14.

fails to create a genuine issue of material fact from which a reasonable factfinder could find that the decision making official had knowledge of Proffitt's protected activity. None of the circumstances outlined by the *Mulhall* court that have led prior courts to infer knowledge from circumstantial evidence - i.e., additional actions by decision makers, telling statements, strong involvement by those with knowledge coupled with interaction with decision makers - is present here.

Because the plaintiff cannot establish the requisite knowledge, the inquiry into this instance of retaliation can end here. *Felts*, 1998 U.S. App. LEXIS 479, at *14. Summary judgment will be granted to defendant Metropolitan Government with respect to this alleged instance of retaliation under both Title VII and the THRA.

2. Stopping Payment on Proffitt's Last Paycheck

As detailed above, when presented with significant discrepancies in Proffitt's billing, Williams ordered payment stopped on Proffitt's last paycheck on September 4 or 5, 2002. Plaintiff contends that this was done in retaliation for her June 24, 2002 participation in the Hughes investigation. As before, the fact that plaintiff engaged in protected activity is undisputed by the Metropolitan Government. The defendant disputes the fact that Williams knew on September

4 or 5, 2002 what Proffitt had told Frazier on June 24, 2002. However, Williams undoubtedly knew that Proffitt had participated in the Hughes investigation because Frazier testified that, when she interviewed Williams as part of the Hughes investigation on July 30, 2002, she specifically asked Williams questions about Proffitt's termination and inquired whether she knew that Proffitt had been part of the investigation. (Docket No. 80, Ex. B, Frazier Dep. at 51-52.) At that time, Williams told Frazier that she did not know that Proffitt had participated in the investigation and that her termination had nothing to do with being a participant in the investigation but was undertaken for budgetary reasons. *Id.* at 53-56. Viewed in the light most favorable to the plaintiff, these facts suggest that Williams did know that Proffitt had engaged in protected activity when she stopped payment on her last paycheck. As to the third element of the *prima facie* case, defendant does not dispute that stopping payment on Proffitt's check is an adverse employment action. However, the plaintiff offers no evidence to draw a causal connection between the protected activity and Williams's stopping payment.

Even if there were such evidence, plaintiff is unable to carry her burden to establish evidence of pretext. Williams stopped payment on plaintiff's check to investigate proof that plaintiff had double-billed, billed for work on unauthorized weekend days, and billed at a rate more than double the rate approved for all summer school employees. After

investigating and corresponding with the plaintiff, Williams ultimately accepted plaintiff's explanation for the double billing and the unauthorized weekend work, but Williams refused to authorize payment for summer school work at her prior rate of pay. (Docket No. 70 at 16.)

As evidence of pretext, the plaintiff states that she was always paid for summer school work at over $38 per hour and that the $15.04 rate is the rate for summer school teachers, a rate that never would have been imposed on "someone working in the administration building." (Docket No. 83 at 23.) In support of this contention, plaintiff cites to her own affidavit and the affidavit of Jayme Marie Merritt, the Vice-President of the Metropolitan Nashville Education Association, who is "responsible for being able to interpret and to negotiate the contract with the school board." (Docket No. 83, Ex. 13, ¶ 1.) Merritt states that the provision limiting the pay of summer school employees applies to teachers who teach in the summer school program only and, to her knowledge, it has never been applied to an employee in the "central office." *Id.* at ¶ 3. She states that she is familiar with the plaintiff and the "position that she held in the Employee Relations Department which was in the central office" and that she "never would have been limited either in her work on the summer school program or her work in the Employee Relations Department to this hourly rate of $15.04 per hour." *Id.* at ¶ 4.

Dr. Johnson, the Chief Instructional Officer and second in command at the central office, testified that there are employees in Learning Support Services who have job duties that include, but are not limited to, dealing with summer school. (Docket No. 80, Ex. D, Johnson Dep. at 19.) Those employees are not limited to the $15.04 contract rate because they are regular 12-month employees with other duties. *Id.* However, Johnson testified unequivocally that part-time employees who work on summer school, whether teachers or administrators, were paid only under the extended contract and only at a rate of $15.04 per hour. *Id.* at 18-20. The opinion testimony of Merritt, the teacher's union Vice-President, which is supported by no documentation or proof of any kind, cannot be used in the face of Dr. Johnson's testimony to create a genuine issue of material fact on this point. In the face of this testimony, plaintiff's evidence is unable to raise a genuine issue of material fact that the reason for stopping payment on her last paycheck was pretextual.

3. Failure to Rehire

Plaintiff contends that it was the policy of the Metropolitan Nashville Public Schools to hire retirees who wished to work in the system, but that, after plaintiff's termination, Tracy Burnett, who was not a prior employee, was hired by the Employee Relations Department of administer the Teacher of the Year project part-time. (Docket No. 83 at 23.) The plaintiff asserts that she would have done

this work if requested to do so.[10] *Id.* For purposes of the *prima facie* case, the plaintiff has not shown that the failure to affirmatively pursue Proffitt to perform a job for which she had not applied is an adverse employment action.[11] Therefore, she has failed to raise a genuine issue of material fact that this action constitutes retaliation for her June 24, 2002 participation in the Hughes investigation.

---

[10]As discussed *supra*, Williams testified that it did not occur to her to offer to let the plaintiff, a professional person, keep her original job in Human Resources, which was a support position, at a lower rate of pay, although she would have considered this option had the plaintiff mentioned it. (Docket No. 69, Ex. E, Williams Dep. at 67.) This reasoning further illuminates any failure to rehire the plaintiff to perform work in Human Resources at a lower rate of pay.

[11]Defendant also argues that it was not retaliation for the Human Resources Department not to rehire the plaintiff in 2003, as evidenced by Dr. June Keel's November 17, 2003 letter to Proffitt stating that she had decided against filling the position of Coordinator of Employee Relations. (Docket No. 69, Ex. H.) Because plaintiff does not assert this claim in her brief, the court will not address it.

4. Counterclaim Filed by the Metropolitan Government

The plaintiff contends that the Metropolitan Government retaliated against her by filing a counterclaim seeking over $500 in overpaid wages, in response to her filing of a lawsuit for discrimination and retaliation. (Case No. 3:03-1167, Docket No.1, Complaint ¶ 8.) The defendant asserts that, after Williams attempted unsuccessfully to secure repayment from Proffitt for this sum in her September 18, 2002 and October 11, 2002 letters, the Metropolitan Government was left with no alternative but to seek repayment pursuant to a counterclaim, in view of the fact that the plaintiff had refused to acknowledge that she owed the money and failed to make arrangements to repay it. (Docket No. 70 at 19-20.)

Plaintiff makes no argument in support of her *prima facie* burden with respect to this claim, nor does she attempt to frame any evidence to the required elements. She merely asserts that neither Garcia nor Williams is aware of any similar lawsuits to recover overpayment of wages and that no one in Williams's office had discussed suing Proffitt to recover the money prior to the suggestion of defendant's counsel. (Docket No. 83 at 23.) Plaintiff weakly states that "[i]t is hard to believe that the Metropolitan Government would file any type of a lawsuit, much less a lawsuit in Federal Court against an employee for such a trivial amount

of money." *Id.* at 24. In fact, defendant Metro did not "file a lawsuit" against the plaintiff to recover this money. At the suggestion of Frank Young of the Metropolitan Legal Department that it "'would be necessary" to seek this recovery in the plaintiff's lawsuit where the usual practice of securing repayment directly from the employee had failed (Docket No. 69, Ex. E, Williams Dep. at 80), the counterclaim was filed. The Metro Legal attorney probably, in error, considered this a compulsory counterclaim under Federal Rule of Civil Procedure 13(a), that would have been waived if not asserted. *See Sanders v. First Nat'l Bank & Trust Co.*, 936 F.2d 273, 277 (6th Cir. 1991) ("It is well established that an opposing party's failure to plead a compulsory counterclaim forever bars that party from raising the claim in another action.") Even the fact that this is a permissive counterclaim, as discussed *infra*, does not indicate that the motivation in filing it was retaliatory. The facts and allegations adduced by the plaintiff are insufficient to establish that the defendant, with knowledge of plaintiff's protected activity, acted adversely to her, and that there is a causal connection between defendant's knowledge of the activity and the adverse action. For this reason, plaintiff's retaliation claim on this count must also fail.

Summary judgment is proper in favor of defendant Metropolitan Government with respect to plaintiff's claim of retaliation in all its forms, under both Title VII and the THRA.

B. Accomplice Liability

Plaintiff claims that Garcia, Williams, and Hughes may be held liable under the aiding and abetting provision of the TIIRA. The THRA provides for individual accomplice liability:

> It is a discriminatory practice for a person or for two (2) or more persons to:...
>
> (2) Aid, abet, incite, compel or command a person to engage in any of the acts or Practices declared discriminatory by this chapter;

Tenn. Code Ann. § 4-21-301. Thus, an individual who aids, abets, incites, compels, or .commands an employer to engage in employment-related discrimination has violated the THRA. *Carr v. United Parcel Serv.*, 955 S.W.2d 832, 836 (Tenn. 1997), *overruled on other grounds by Parker v. Warren County Util. Dist.*, 2 S.W.3d 170 (Tenn. 1999). In accordance with the *Carr* court's general definition of accomplice liability and its application of the TIIRA's aiding and abetting provision to the hostile work enviromnent context, this court previously found that individual accomplice liability for retaliation arises when an individual acts affirmatively to aid, abet; incite, compel, or command an employer to take an adverse employment action against an employee because of the employee's protected activity, and the employer takes that adverse action. (Docket No. 39 at 15.)

Courts interpreting Tennessee Law have established that, in cases where there is no underlying THRA violation by

the plaintiff's employer, there is nothing for an individual to aid or abet, and, thus, no accomplice liability. *See Thompson v. City of Memphis*, Nos. 02-5421, 02-5656, 2004 U.S. App. LEXIS 480, at. *21-22 (6th Cir. Jan. 12, 2004). ("It is therefore unnecessary to consider whether there is enough evidence in the record to support a finding that [the individual defendants] aided and abetted the City's violation of the THRA because the City did not violate the THRA in the first instance."); *Guster v. Hamilton County Dep't of Educ.*, No. 1:02-cv-145, 2004 U.S. Dist. LEXIS 10170, at *93 (E.D. Tenn. Mar. 2, 2004) ("Because there is no violation of the THRA by [plaintiff's] employer[], there is no underlying THRA violation for [the individual defendant] to aid and abet.").

Because the court has found that the plaintiff has failed to establish that the Metropolitan Government may be held liable for retaliation under the THRA, it need not determine whether the individual defendants could be held liable as accomplices to retaliation. Therefore, summary judgment will be granted with respect to the THRA claims of retaliation against Dr. Gene Hughes, Dr. Pedro Garcia, and Dr. Julie Williams.

C. Sexual Harassment Under the THRA

The THRA provides that-a civil action under the Act must be filed "within one (1) year after the alleged discriminatory practice ceases." Tenn. Code Ann. § 4-21-311(d) (2004). The Metropolitan Government asserts that summary judgment should be granted in its favor with respect to the plaintiff's claim of sexual harassment under the THRA because any offensive behavior engaged in by Hughes against Proffitt must have occurred prior to June 30, 2002 . (Docket No. 70 at 11, 12.) Because plaintiff commenced her civil action in this court on June 30, 2003, only conduct that occurred on or after June 30, 2002 is within the statute of limitations. The plaintiff agrees that the sexual harassment of which she complains occurred prior to June 30, 2002. (Docket No. 83 at 18.) Therefore, summary judgment will be granted in favor of the . Metropolitan Government on this claim.

D. Plaintiff's Motion for Summary Judgment

The plaintiff asserts that summary judgment should be granted in her favor, or the defendant's counterclaim should be dismissed, because the plaintiff had an oral contract which the defendant breached when it failed to pay her the agreed wage after she had fully performed the summer school work in July and August 2002. (Docket No. 72 at 9-10.) Plaintiff

also argues that the counterclaim should be dismissed because the court lacks jurisdiction over it, since it is not a compulsory counterclaim. *Id.* at 11. The Metropolitan Government, Garcia, and Williams assert that the court should exercise pendent jurisdiction over the counterclaim because it is part of the same case or controversy as the claims plaintiff asserts against the defendants--whether plaintiff owes the government any money in overpaid salary is inexorably intertwined with plaintiffs claim that the government retaliated against her. (Docket No. 79 at 3.)

Rule 13 of the. Federal Rules of Civil Procedure contemplates two kinds of counterclaims. A compulsory counterc1aim is one "which at the time of serving the pleading the pleader has against any opposing party) if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Fed. R. Civ. P. 13(a). A permissive counterclaim is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(b). The Sixth Circuit "applies the 'logical relationship' test for determining whether a claim arises out of the same transaction or occurrence," under which the court determines "whether the issues of law and fact raised by the claims are largely the same and whether substantially the same evidence

would support or refute both claims." *Sanders*, 936 F.2d at 277.

In this case, although both the plaintiff's claims and the defendants' counterclaim involve generally the same time period and some of the same facts, crucial distinctions convince the court that the counterclaim is permissive. First, the issues of law are completely different. Plaintiff's claims implicate the state and federal anti-discrimination laws and inquire into the parties'knowledge, motivation, and conduct surrounding plaintiff's participation in the sexual harassment investigation for their bases. The counterclaim, although vaguely stated, implicates issues of state contract law and inquires into the promises of the various parties as to the rate of pay properly applied to plaintiff's work on the summer school project during the summer of 2002. Evidence adduced in support of plaintiff's claims sheds no light on the number of hours plaintiff worked on the summer school project, when the work was performed, her status in connection with the state extended contract money, and the amount of money owed to her or the Metropolitan Government. Although there may be some overlapping evidence, the defendant's claim would by no means be supported or refuted in full by the evidence adduced in connection with plaintiffs claims. For these reasons, the court finds that the defendant's counterclaim is permissive.

Unlike compulsory counterclaims, over which federal courts may exercise supplemental jurisdiction, permissive

counterclaims require an independent basis of subject matter jurisdiction to be heard in federal court. *See Owner-Operator Indep. Drivers Ass 'n, Inc. v. Arctic Express, . Inc.*, 238 F. Supp. 2d 963, 968 (S.D. Ohio 2003); *Cant'l Cablevision of Mich., Inc. v. Edward Rose Realty, Inc.*, L 87-17 CA 5,1988 U.S. Dist. LEXIS 18088, at *6 (W.D. Mich. Aug. 26, 1988); *see also* Moore's Federal Practice - Civil § 13.110 (2004). The defendant's counterclaim implicates state law and offers no independent basis or jurisdiction. Accordingly, the defendant's counterclaim will be dismissed.

D. Defendant's Motion to Strike Plaintiff's Statement of Additional Material Facts and Motion to Strike Affidavits

The Metropolitan Government, Garcia, and Williams move to strike plaintiff's statement of additional material facts and the affidavits of plaintiff, Tamara Sadler, and Vicky Crawford. (Docket No. 87 at 1.) These defendants assert that plaintiff's statement contains voluminous, immaterial information, some of which is quoted verbatim from plaintiff's memoranda responding to defendants' motions for summary judgment and a great deal of which is argumentative and nonfactuaL (Docket No. 88 at 1-2.) These defendants object to the affidavits on the basis that they are allegedly riddled with hearsay, conclusory allegations, and subjective

beliefs. *Id.* at 4. The plaintiff urges the court not to strike these filings and argues that the defendants have made little effort to highlight the objectionable portions of the statement of facts. (Docket No. 96 at 1.) Defendant Hughes responds to plaintiffs statement of additional . material facts but supports the additional defendants' motion to strike. (Docket No. 91 at 2.) Although plaintiff's statement of additional material facts is lengthy and contains some "factual information" which is more argumentative than factual, the court declines to strike the statement. The court has considered only those facts that it is certain cannot be disputed. Similarly, the court finds that much of the plaintiff's sworn affidavit, on which it has relied, is based on personal knowledge and constitutes properly admissible evidence. Accordingly, the defendants' motion to strike will be denied.

Conclusion

For the reasons stated herein, the defendants' motions for summary judgment will be granted. Defendant's counterclaim will be dismissed for lack of jurisdiction, and plaintiff's motion for summary judgment will be denied as moot. Defendants' motion strike will be denied.

An appropriate order will enter.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

THE SCHOOL BOARD OF
BROWARD COUNTY, FLORIDA
OFFICE OF
PROFESSIONAL STANDARDS & SPECIAL
INVESTIGATIVE UNIT
(954) 765-7077 - - FAX (954) 767-8579

July 1, 2002

TO: Thomas J. Geismar, Ed.D.
North Central Area Superintendent

FROM: Joe Melita, Executive Director
Professional Standards & Special
Investigative Unit

RE: **EUGENE HUGHES - FORMER ASSISTANT PRINCIPAL NORTH AREA EDUCATION CENTER**

Attached is a copy of the Final Order in the case of Eugene Hughes. This case came before a teacher panel of the Education Practices Commission (EPC) on June 6, 2002. It was determined that Mr. Hughes' Florida Educator's Certificate be **PERMANENTLY REVOKED.**

This is for informational purposes only. If you have any questions, please contact me at 765- 7077.

JM:ms
Attachment(s)

c: Roma Adkins, Director, Administrative Procedures
Gracie Diaz, Director, Instructional Staffing

Linda Wilhoit, Principal, North Area Education Center
Valerie Wanza, Principal, South Area Alternative Center
Personnel Records

Before the Education Practices Commission of the State of Florida

CHARLIE CRIST, as
Commissioner of Education,
Petitioner,

vs. CASE No. 02-0321-RA
EPC INDEX No. 122 -FOI

EUGENE PATRICK HUGHES,
Respondent.
_____/

Final Order

Respondent, EUGENE PATRICK HUGHES, holds Florida educators certificate No. 602614. Petitioner has filed an Administrative Complaint seeking suspension, revocation, permanent revocation or other disciplinary action against the certificate. A copy of the Administrative Complaint is attached to and made a part of this Order.

Service of the Administrative Complaint was perfected upon Respondent Certified US Mail with return receipt received.

Respondent has failed to respond to the Administrative Complaint and has not requested a hearing or any other proceeding.

This matter was heard by an administrator panel of the Education Practices Commission pursuant to Section 231.262, Florida Statutes, and Rule 6B-11.004(6), Florida

Administrative Code, on June 6, 2002, in Tampa, Florida. Petitioner was represented by Ronald Stowers, Attorney at Law. Respondent was neither present nor represented.

The Commission finds that Respondent was properfyserved with the Administrative Complaint, has failed to timely respond and has waived any right to be heard.

As the Respondent has not replied to the Administrative Complaint nor contested the factual allegations, the Petitioner's attorney offered documents to prove the facts as alleged in the Administrative Complaint. These were received into evidence and were found to clearly and convincingly support the allegations and establish a prima facie case.

FINDINGS OF FACT

1. The allegations of fact set forth in the Administrative Complaint are approved, adopted. and incorporated herein by reference as the findings of fact by the panel.

2. There is competent, substantial evidence to support the panel's findings.

CONCLUSIONS OF LAW

1. The conclusions of law alleged and set forth in the Administrative Complaint are approved, adopted, and incorporated herein by reference as the conclusions of law by the panel.

2. There is competent, substantial evidence to support the panel's conclusions.

3. The violations committed by the Respondent warrant disciplinary action by the Education Practices Commission.

PENALTY

Upon-consideration of the file in this case, it is ORDERED that Respondent's Florida Educator's Certificate is hereby PERMANENTLY REVOKED and he is ERMANENTLY BARRED from applying for another.

This Order takes effect upon filing.

DONE AND ORDERED, this 6th day of June, 2002.

/s/ Roy Brooks
ROY BROOKS, Presiding Officer

COPIES FURNISHED TO:
Bureau of Educator Standards

Bureau of Teacher Certification

Florida Admin. Law Reports

Dr. Franklin L Till, Jr.; Superintendent
Broward County Schools
600 S.E. 3rd Ave.
Ft. Lauderdale, FL 33301-3125

Dr. Joe Melita, Executive Director
Professional Standards

Broward County Schools

Ronald Stowers, Attorney at Law

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE EDUCATION PRACTICES COMMISSION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF THE FILING OF THIS ORDER.

CERTIFICATE Of SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order in the matter of Charlie Crist vs. Eugene Patrick Hvghes was mailed to Eugene Patrick Hughes. PO Box 2624, Browning MT 59417, by Certified U.S. Mail, this 11th day of June, 2002

/s/ Kathleen M. Richards
KATHLEEN RICHARDS, Clerk

STATE OF FLORIDA
EDUCATION PRACTICES COMMISSION

CHARLIE CRIST, as
Commissioner of Education,
Petitioner,

vs. CASE NO. 001-1008-M
EUGENE PATRICK HUGHES,
Respondent.
_____/

ADMINISTRATIVE COMPLAINT

Petitioner, Charlie Crist, as Commissioner of Education, files this Administrative Complaint against Eugene Patrick Hughes. The Petitioner seeks the appropriate disciplinary sanction of the Respondent's educator's certificate pursuant to Sections 231.262 and 231.2615, Florida Statutes, and pursuant to Rule 6B-1.006, Florida Administrative Code, Principles of Professional Conduct for the Education Profession in Florida, said sanctions specifically set forth in Sections 231.262(6) and 231.2615(1), Florida Statutes.

The Petitioner alleges:

JURISDICTION

1. The Respondent holds Florida Educator's Certificate 602614, covering the area of Emotionally Handicapped and Educational leadership, which was valid through June 30, 2000.

2. At all times pertinent hereto, the Respondent was employed as an Assistant Principal at South Area Alternative Center in the Broward County School District.

MATERIAL ALLEGATIONS

3. During the 1999-2000 school year, Respondent sexually harassed several female employees, including R.M., R.B., A.E., and R.L. The harassment included inappropriate, unsolicited and unwelcome comments concerning their dress or appearance and requests for sexual favors.

4. On or about April 16 and May 2, 1999, Respondent purchased items from a hardware store using a school account. The purchases were unauthorized and/or for personal use. On or about July 18, 2000, Respondent received a letter of reprimand for unauthorized expenditure of school funds. On or about July 31, 2000, Respondent ,vas reassigned to a teaching position. Effective August 22, 2000. On or about August 17, 2000, Respondent notified school district officials that he would not accept an offer as a teacher with the district. Thereafter, the school district notified

Respondent that his letter of August 17, 2000, was accepted as a letter of resignation effective the same date.

STATUTORY VIOLATIONS

COUNT 1: The allegations of misconduct set forth herein are in violation of Section 231.2615(1)(c), Florida Statutes, in that Respondent has been guilty of gross immorality or an act involving moral turpitude.

COUNT 2: The allegations of misconduct set forth herein are in violation of Section 231.2615(1)(f), Florida Statutes, in that Respondent, upon investigation, has been found guilty of personal conduct which seriously reduces his effectiveness as an employee of the school board.

COUNT 3: The allegations of misconduct set forth herein are in violation of Section 231.2615(1)(i); Florida Statutes, in that Respondent has violated the Principles of Professional Conduct for the Education Profession in Florida prescribed by the State Board of Education.

RULE VIOLATIONS

COUNT 4: The allegations of misconduct set forth herein are in violation of Rule 6B- 1.006(4)(c), Florida Administrative Code in that Respondent has used institutional privileges for personal gain or advantage.

COUNT 5: The allegations of misconduct set forth herein are in violation of Rule 6B.1.006(5)(a), Florida

Administrative Code, in that Respondent has failed to maintain honesty in all professional dealings.

COUNT 6: The allegations of misconduct set forth herein are in violation of Rule 6B1.006(5)(d), Florida Administrative Code in that Respondent has engaged in harassment or discriminatory conduct which unreasonably interfered with an individual's performance of professional or work responsibilities or with the orderly processes of education or which created a hostile, intimidating, abusive, offensive, or oppressive environment; and further, failed to make reasonable effort to assure that each individual was protected from such harassment or discrimination.

WHEREFORE, the Petitioner recommends that the Education Practices Commission impose an appropriate penalty pursuant to the authority provided in Sections 231.262(6) and 2312615(1). Florida Statutes, which penalty may include a reprimand, probation, restriction of the authorized scope of practice, administrative fine, suspension of the teaching certificate not to exceed three years, permanent revocation of the teaching certificate or combination thereof, for the reasons set forth herein and in accordance with the Explanation and Election of Rights forms which are attached hereto and made a part hereof by reference.

EXECUTED on this 13 day of February, 2002.

/s/ Charlie Crist
Charlie Crist, as
Commissioner of Education,
State of Florida

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DIANNE B. PROFFITT
Plaintiff,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Case No. 3:03-1167
JURY DEMAND
Judge Trauger
Magistrate Judge Brown

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

VICKY S. CRAWFORD,
Plaintiff,

vs.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Case No. 03C-1455

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

VICKY S. CRAWFORD,
Plaintiff,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Case No. 3:03-0996
JURY DEMAND
Judge Campbell
Magistrate Judge Brown

Deposition of:

DR. GENE P. HUGHES

Taken on behalf of the Plaintiffs
April 23, 2004

ELITE REPORTING SERVICES
MAX CURRY, B.C.R., RPR, CCR, CRI
Bachelor's Degree of Court Reporting
P.O. Box 292382
Nashville, Tennessee 37229
(615) 595-0073

the ADA case that your office cut out her OJI benefits in retaliation?

A. I -- it wasn't retalianon. I don't agree with that statement.

Q. Okay.

MS. MARTIN: Are you asking him that that's the claim you made?

MS. STEINER: Yes.

MS. MARTIN: She's not asking if you agree with it.

BY MS. STEINER:

Q. So, that the office had retaliated against her by stopping her OJI benefits and the Metro had discriminated against her.

A. Yes.

Q. When you received notice of the retaliation claim, who in - - was that investigated by Metro?

A. I don't recall.

Q. Okay. Did anyone every question you about the retaliation portion of that claim?

A. I don't recall.

Q. Do you recall Jennifer Bozeman?

A. Yes.

Q. Was she involved in the Collins matter?

A. I'm not sure.

Q. Do you recall whether or not she was the first attorney assigned by Metro Legal to investigate the Collins matter?

A. I'm not sure.

Q. Okay. Did anyone at Metro ask you whether or not you had retaliated against Amy Collins?

A. If they did, I don't recall specifically.

Q. Okay. Now, have you been involved in any other lawsuits?

A. The lawsuits pending with your clients.

Q. Okay. What about anything outside of Ms. Crawford's case, Ms. Proffitt's case, and Ms. Collins' case?

A. I'm -- a Ms. Hamilton.

Q. Excuse me?

A. A Ms. Hamilton.

Q. And who is Ms. Hamilton?

A. She was an employee with the District.

Q. And has she filed a lawsuit against the District?

A. Yes.

Q. And what does that lawsuit allege?

A. I don't -- I'm not clear on it.

Q. Do you have idea what she's alleging?

A. I don't, and I believe the lawsuit was dismissed.

Q. And did you have any supervisory authority over Mis Proffitt?

A. None.

Q. So you had no authority to tell her what her job duties were, where she would do it, or what her hours would be?

A. Correct.

Q. And you had no input into what her job duties actually were?

A. Correct.

Q. So, you would have had no business duty to explain to Ms. Williams or anyone else what Ms. Proffitt's job duties were?

A. Correct.

Q. And is it a fair statement that you -- did you ever explain to Ms. Williams what Ms. Proffitt's job duties were?

A. No.

Q. Okay. Did you ever fill out a form for Ms. Williams setting out exactly what Ms. Proffitt did in your office?

A. No.

Q. Okay. Now, did you have any supervisory authority over Ms. Crawford?

A. No.

Q. Okay.

A. That' s my understanding.

Q. Now, for Dr. Williams do you know whether or not she did assign these discrimination claims to anybody else other than you?

A. I don't know.

Q. Okay. So then, if she had testified that you were the one primarily in charge of the discrimination investigations and retaliation investigations, would you have any reason to differ from that?

A. If that was her policy, no. I don't know what her mind set was on that.

Q. Now, did anyone ever question you in the year 2002 about whether or not you had retaliated against Tamara Sadler?

A. I don't believe so.

Q. Did anyone ever question you about whether or not you had retaliated against Dianne Proffitt?

A. I don't believe so.

Q. And did anyone ever question you about whether or not you had retaliated against Vicky Crawford?

A. don't believe so.

Q. Okay. Now, I want to ask you a little bit about your background.

Tell me a little bit about your educational

revenge on you?

A. Outside of what Tamara -- no. I don't think so.

Q. Okay. Now, so then, when you found out about the sexual harassment then, had these clerical people already told you that Ms. Sadler, Ms. Proffitt, and Ms. Crawford were trying to get revenge on you?

A. (Nodded head affirmatively.)

MS. MARTIN: Object to the form of the question.

BY MS. STEINER:

Q. Was that a yes?

A. I was listening to her. Can you repeat it.

Q. Before the complaint of sexual harassment, had you already been told then that Ms. Sadler, Ms. Proffitt, and Ms. Crawford were trying to get revenge on you?

A. Ms. Sadler and Ms . Proffitt's names were mentioned. I don't recall when Ms. Crawford's name was mentioned, how far into the process.

Q. And then is this before the complaint of sexual harassment?

A. Yes, ma'am.

Q. So then, when you were told about the sexual harassment complaint, did you ever think that it's probably those two or three?

A. That was one of the suspects, but at the time I

Q. Okay. And before you got a copy of the report, before you got it through your attorney did anyone at Metro ever tell you that you -- that the report had found that you had engaged in inappropriate conduct?

A. No --

Q. Did any of your supervisors --

A. – I don't believe so.

Q. – ever sit down with you and request that you stop engaging in certain actions or watch what you say?

A. They may have. I don't recall specifically, though.

Q. Did anyone at Metro ever tell you that you -- it had been determined that you had engaged in inappropriate conduct?

A. I don't recall them doing that specifically, no.

THE WITNESS: (Witness reviews document.)

MS. MARTIN: Listen to the question. If she wants you to refer to the report, she will want to make sure you're listening to her questions.

THE WITNESS: Okay.

BY MS. STEINER:

Q. Now, when you got this report through your attorney --

A. Uh-huh.

Q. – did you have any discussions with any of the

A. I don't believe so specifically.

Q. Okay. Did Diane Burden or anyone else from payroll ever confront you about problems with Vicky Crawford?

A. I got several phone calls from people who wanted to remain anonymous because they were afraid of boldly injury. They were yelled at down there. There was profane language with them. That things weren't right in Payroll. Things like student loans weren't being paid, tax money wasn't being taken care of correctly, things in general. Things I wouldn't understand how they weren't done.

Q. Okay. And do you know the names of the' people who called you?

A. No. They wanted to remain anonymous. They said they wanted to.

Q. Okay.

A. And some of them said they had worked in the office and left because of Vicky. And some said they worked in the business office, not in the Payroll, but were afraid if she found out, that they were afraid of her friends or her.

Q. And did you refer these people on to anyone else?

A. They didn't want to come forward. I took their information.

Q. Did you conduct any sort of an investigation?

A. No. At this time when I .started getting more and more phone calls like that, there was already an audit going on. So what I did was write down the information that those people gave to me and I passed it on to the auditors who were in the building, since I knew nothing about how to investigate those things. These were things that people were reporting. I never heard back.

Q. And what auditors did you pass it on to?

A. I don't know their names. Whatever group of people were in our building. were in the administration building.

Q. Okay. Okay.

A. I just listed all the allegations that people complained of, but this is what was being said on the report.

Q. And these complaints were primarily against Vicky Crawford?

A. Yeah.

Q. Is that a yes?

A. Yes.

Q. And so then when you got these reports from these anonymous people, you passed it on to the auditors?

A. Correct.

Q. And would that have been sometime after September of '02?

A. No, I didn't know she was involved.

Q. After you got the report, did you ask her any questions about her participation?

A. No.

Q. Do you -- did anybody from Metro ever question you about whether or not you had engaged in any retaliation against Dianne Proffitt, Ms. Sadler, or Ms. Crawford?

A. No.

Q. Did anyone from Metro ask you whether, or not you were involved in the terminations of any of these three individuals?

A. No.

Q. Did anyone suggest whether or not you had given information to any source that led to the termination of these three individuals?

A. I don't believe so.

Q. Did you have any discussions with Dr. Pedro Garcia about the termination of Ms. Crawford?

A. No.

Q. Did you have any discussions with him about the termination of Ms. Sadler?

A. No.

Q. Did you know whether or not Dr. Garcia was provided information with regard to the termination of Ms. Sadler?

A. I wouldn't know.

REPORTER'S CERTIFICATE

STATE OF TENNESSEE
COUNTY OF DAVIDSON

I, Roy M. Curry, Jr., court reporter, with offices in Nashville, Tennessee, hereby certify that I reported the foregoing deposition of DR. GENE P. HUGHES by machine shorthand to the best of my skills and abilities, and thereafter the same was reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

/s/ Roy M. Curry, Jr.
ROY M. CURRY, JR., B.C.R., RPR, CRI, CCR
Bachelor's Degree of Court Reporting
Registered Professional Reporter
Certified Reporting Instructor,
Certified Court Reporter, and
Notary Public
State of Tennessee At Large

My Commission Expires: 03/27/05

Fact Finding Report

Department: Board of Education
Fact finders: Veronica Frazier and Delaine Barwise
Date: September 13, 2002

Summary:

Jennifer Bozeman, an attorney with the Legal Department, contacted the Human Resources Department about a potential sexual harassment complaint in regard to Dr. Gene Hughes, Director of Employee Relations for the Metropolitan Nashville Public School System. As an attorney for the Board of Education, Ms. Bozeman felt an obligation to responsibly address these issues in order to ensure compliance with the established policies and procedures and to make sure that there were no unforeseen problems in the workplace.

As the Director of Employee Relations, Dr. Hughes is responsible for EEO investigations, including sexual harassment claims that are made by the Board of Education's employees. The scope and complexity of Dr. Hughes' position with the Metropolitan School District, in addition to obvious conflicts that may arise due to such serious allegations, clearly put Ms. Bozeman on notice to address these concerns with Dr. Pedro Garcia, Superintendent of Public Schools, and the Human Resources Department.

Witnesses:

Unless required for a direct quote, responses from interviews are summarized. Those interviewed are listed below in alphabetical order. All witnesses are employees with the Board of Education.

Jennifer Bozeman	Jackie Gauthier	Diane Proffitt
Diane Burden	Dr. Gene Hughes	Tamara Sadler
Vickie Crawford	Jayme Merritt	Dr. Julie Williams

Allegations

During routine conversation, Ms. Bozeman learned from Ms. Tamara Sadler, an Administrative Assistant with the Board of Education that there were several employees within the Administrative office that had expressed concern about specific incidents of inappropriate behavior exhibited by Dr. Hughes.

Throughout the course of the investigation, Fact finders learned about other general allegations concerning the workplace environment at the Board of Education. Although these matters were brought to our attention, they are not in the realm of this EEO claim. However, due to the severity and seriousness of these claims, the Internal Audit Division of the Finance Department has been notified in order to ensure that these matters are investigated and resolved.

In the following report, Fact finders have attempted to address all allegations made by the complainants that would be covered under EEO guidelines.

A. Inappropriate Physical Contact

1. In May 2002, a witness alleged that she approached Dr. Hughes concerning business that he was conducting with the Payroll Department, and said, "Hi, Dr. Hughes. What's up?" The witness claims that Dr. Hughes entered her office and pulled the witnesses' head into his crotch. The witness stated that her head touched Dr. Hughes' pants and groin area. The witness allegedly responded to Dr. Hughes by saying, "Get the hell out of my office."

Response

Dr. Hughes does not recall any specific incident where he would have pulled someone's head into his crotch. Dr. Hughes acknowledged that he frequently has questions about payroll issues in connection with sick pay, workers' compensation pay and leaves of absence. Dr. Hughes agreed that it would not be out of the ordinary for him to request information from the payroll department.

B. Inappropriate Behavior

1. Fact finders asked a witness to describe Dr. Hughes' demeanor. The witness responded, "Dr. Hughes struts around like a rooster in a hen yard. He pulls his shoulders back and acts like a bad ass, a super-duper football player." The witness alleges that when she would say, "Hi, Dr. Hughes. What's up," Dr. Hughes would grab his crotch and say, "I'll tell you what's' up."

2. A witness alleged that Dr. Hughes walked up to the window facing into her office and said, "Hey Baby, come on, don't you want to get close to my body?" The witness stated that Dr. Hughes proceeded to rub his body against the window.

3. A witness alleged that while she was sitting at her desk in her office, Dr. Hughes came in and said, "Why don't you show me some titties?" The witness replied, "I'd better not, Pedro would not like that." Dr. Hughes said, "You never know, he might."

4. In addition to these allegations, the witness told Fact finders that it was not unusual for her and Dr. Hughes to engage in conversation that included sexual references. The witness said that her normal response

to these verbal exchanges would include, "Go to hell," or "Kiss my ass," and she would often motion to him by "flipping him a bird." The witness described their working relationship as "casual."

5. A witness stated that at first, Dr. Hughes made her feel uncomfortable. When questioned further about this statement, the witness said, "Just how he interacts." On one occasion, the witness alleged that Dr. Hughes questioned her and said, "What the fuck do you think you're doing?" The witness claimed that the most inappropriate behavior that Dr. Hughes displayed in the office was the hand gesturing and motioning in front of his crotch. The witness also stated that Dr. Hughes often used the phrase, "Bite me."

This witness expressed a serious concern about retaliation from her participation in the investigation. The witness claimed, "If my name comes out of this, I won't have a part-time job."

*Fact finders note that this witness was terminated mid-investigation. shortly after the interview on June 24, 2002. Dr. Julie Williams, Assistant Superintendent of Human Resources, stated that she was responsible for the termination of this witness.

Dr. Williams further indicated that Dr. Hughes had nothing to do with the decision to terminate this witness' part-time employment. Dr. Williams stated that she was not aware of the investigation, the claims that this witness made during the interview session, or this witness' apprehension in coming forward to discuss her work relationship with Dr. Hughes. Dr. Williams commented that no one at the Board of Education really knew that this witness was on the payroll. Dr. Garcia was not aware of her employment or her position. Dr. Williams said that after inquiring about her work and her responsibilities she learned that the witness was under Dr. Hughes' supervision. One of this witness' responsibilities during the year was the coordination of the Annual Teacher's Banquet. Dr. Williams stated that the witness was a retired principal and had continued to receive her pension in addition to receiving the same annual salary that she received as a principal. During the time that the witness was on the Board of Education's administrative payroll, she received an annual salary of $58,000 plus her retirement pension. At the end of the fiscal year, Dr. Williams determined that this witness' services were no longer needed, as her employment with the Board of Education was not under contract. Dr. Williams acknowledged that this witness' pay was at the top of the pay scale for

principals and the witness was not contributing to a student-based budget Dr. Williams said, "For $58,000, we could hire two clerks for Dr. Hughes. Gene Hughes did not have anything to do with the termination - it was my decision and it was strictly budgetary."

6. A witness referenced her perception of Dr. Hughes' interaction with the Union and Mr. McMackin. The witness alleged that Dr. Hughes continuously made snide comments about the Union. In a discussion with Dr. Hughes, the witness claimed that Dr. Hughes said, "You would do better if you quit hanging with the enemy. I can see to it that you are never in administration. That's not a threat, that's a promise."

*Fact finders note that Dr. Williams said that she counseled Dr. Hughes on his performance and behavior when dealing with the Union. Dr. Williams said that she advised Dr. Hughes to change his demeanor when communicating with the Union officials. Dr. Williams said that the Union officials did not consider Dr. Hughes to be attentive and was often perceived to be aggressive and terse in his interaction with the Union.

Response

Dr. Hughes denies all allegations of inappropriate conduct or conversations that would entail sexual references. In addition, Dr. Hughes rejects any claims that he touched himself or made comments or suggestions about masturbation. Dr. Hughes disagrees with the allegation that he used the word "fuck"and does not believe that he ever made an employee feel uneasy or uncomfortable.

Dr. Hughes concedes that he uses the phrase "bite me" at work and has possibly said, "Go to hell," in addition to engaging in hand gesturing when "shooting a bird."

Dr. Hughes admits to participating in inappropriate language with one particular witness. Dr. Hughes agreed with the term "banter" when describing these conversations; however Dr. Hughes refutes the claim that this communication contained sexual terminology or innuendo.

Dr. Hughes acknowledged that he sensed a great deal of animosity toward him upon his acceptance of his current position with the Board of Education. Dr. Hughes believed that the person that was in his

position prior to his employment was responsible for the ill will and hostility that he has endured from the beginning of his service with Metro Schools. Dr. Hughes emphasized to Fact finders that upon the completion of this investigation, he assumed that more complaints would follow.

Issues and Conclusions

A. Inappropriate physical contact

Fact finders could not confirm allegations of inappropriate physical contact between one witness and Dr. Hughes at their workplace. Dr. Hughes denies such behavior and there are no witnesses to corroborate the witness' claim.

B. Inappropriate behavior

1. Fact finders could not confirm the complainant's statements; however, Fact finders note that more than one witness referenced their perception of Dr. Hughes' arrogance and penchant for grabbing his crotch.

2. Fact finders could not confirm the complainant's allegations. Dr. Hughes denies such behavior and

there are no witnesses to corroborate the witness' claim.

3. Fact finders could not confirm the witness' allegations. Dr. Hughes denies such behavior and there are no witnesses to corroborate the witness' claim.

4. Fact finders did find evidence of inappropriate behavior between this witness and Dr. Hughes; however, Fact finders could not confirm the witness' allegations where conversation included sexual references, since Dr. Hughes denied any use of sexual references or innuendo. Both parties admitted to Fact finders that their conversation and work relationship was routinely casual in nature. Dr. Hughes and this witness acknowledged use of inappropriate language during conversations at work. Dr. Hughes and this witness concede to using hand motions when "shooting a bird." in response to a comment.

5. Fact finders could not confirm the complainant's allegation that Dr. Hughes used the word "fuck." Dr. Hughes did admit during Fact finders first interview that he used the phrase "bite me," but could not think of a time when the phrase might be appropriate or what context he would have used the phrase at work.

At the completion of Fact finders second interview, Dr. Hughes admitted to using the phrase "bite me" at work..

6. Fact finders could not confirm complainant's statements. Dr. Hughes denies that he made such a reference to the witness' relationship with the Union. Dr. Hughes recognized that he does have a difficult relationship with the Union and that their communication is often strained and tense.

Fact Finders' Observations

- Fact finders agree that Ms, Bozeman was put on notice to report issues and concerns about an employee at the Board of Education. regarding behavior that might constitute Sexual Harassment as conveyed to her by another employee at the Board of Education. The complexity of Dr. Hughes' position, including his responsibility in reviewing and investigating sexual harassment complaints clearly compounded Ms. Bozeman's concerns.

- Fact finders concluded that Dr. Hughes did participate in inappropriate and unprofessional behavior. After completing the interviews, Fact finpers noted that there were some employees who engaged in

inappropriate language and behavior before Dr. Hughes was employed. It appears that management at the Board of Education has never addressed this inappropriate language and behavior in their workplace.

- The perception of management at the Board of Education, in addition to gossip and rumor-mongering, has most certainly lead to a workplace that is plagued by low employee morale and raises concern about productivity. Management personnel at the Board of Education may want to renew their efforts to establish and maintain a productive workplace that is respectful of all employees. A work environment that is conducive to ethical standards and professionalism will in turn foster a high level of production, efficiency, and creativity and will improve workplace morale.

- Fact finders did note that two of the witnesses were especially fearful about the loss of their jobs. The witnesses' apprehension about participating in this investigation was greater than Fact finders would reasonably expect.

- Fact finders were made aware of allegations concerning drug purchasing and drug use between a witness and an employee in the mailroom.

- Fact finders recommend that the Board of Education complete an assessment of the Human Resource Division and provide training and education for staff with an emphasis on supervisory training, Metro Human Resources would be happy to assist the Board of Education with any training needs. Please call Flora Fann at 864-6640 for further training information.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DIANNE B. PROFFITT	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:03-0587**
	)	**Case No. 3:03-1167**
THE METROPOLITAN	)	**Judge Trauger**
GOVERNMENT OF NASHVILLE AND	)	
DAVIDSON COUNTY, TENNESSEE,	)	
ET AL.,	)	
Defendants.	)	

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

AFFIDAVIT OF TAMARA SADLER

I, Tamara Sadler, after being duly sworn in accordance with law do hereby swear and affirm that the foregoing information is true and accurate to the best of my personal knowledge, information and belief.

1. I am Tamara Sadler; I worked for the Metropolitan Government of Nashville and Davidson County, Tennessee as the Director of the Employee Relations Department of the Metropolitan Government from February of 2000 until August of 2001.

2. My position changed in July of 2001 when Dr. Pedro Garcia became the Director of Schools. Prior to that point, I was the senior secretary in Employee Relations.

3. After August of 2001, I was the Administrative Assistant to the Assistant Superintendent of grades Pre-K through 4.

4. I was contacted by Jennifer Bozeman an attorney in the Metropolitan Legal Department, approximately 1 week before June 12, 2002 to ask about a pending lawsuit. During the course of that conversation Jennifer Bozeman told me that she knew it was no consolation but that she did miss me being in the Employee Relations Department. I told her that's right it is no consolation. She informed me that she thought that I was treated badly by Gene Hughes and Pedro Garcia. She also informed me that see did not think Gene Hughes or Graciela Escobedo were truthful and all conversations with these two were done through e-mail so that they would have a record of what was said. She alluded to the fact that Gene Hughes had acted inappropriate with her and I told her that I had heard that as well through other sources and I may have told her that two other employees had said the same to me.

5. Within a day or two prior to June 12,2002, Veronica Frazier contacted me and Veronica Frazier told me that she wanted me to come down and speak with her concerning an exchange between Jennifer Bozeman and myself. I did not know who Veronica Frazier was. I asked her what this was about and Ms. Frazier told me that it was about Gene Hughes. I told her that I

didn't want to speak with her about this because everything I knew was hearsay.

6. Thereafter, on June 12, 2002, I was in court on a different matter with Jennifer Bozeman and I told Jennifer that I thought that we were speaking personally the prior day and that I was angry that she had informed Ms. Frazier of our conversation. Jennifer Bozeman told me that she had to report information such as what we had discussed the prior day. I told Jennifer Bozeman that I didn't report anything because I didn't see anything. I then asked who is Veronica Frazier. Jennifer Bozeman informed me that she was the Associate Assistant Director of Human Resources for all of Metro. She informed me that the Hughes matter had been discussed with Metro Legal Department and it was decided that Veronica Frazier was the only one they could trust and that the Metro Legal Department had decided to take it outside of the Metropolitan Board of Education. I told Jennifer Bozeman that I didn't like it, I would speak with Ms. Frazier and that I would end up losing my job over this. Jennifer Bozeman assured me that I would not lose my job over this.

7. Within a few days of June 12,2002, I met and spoke with Veronica Frazier. I told her that I didn't want to get involved and I even cried in her office. I told Ms. Frazier that I did not want to be in the position of being involved in the investigation because they (referring to Dr. Pedro Garcia and Gene Hughes) will find out it is me and I will be fired. I was assured that this would not occur. Based upon this assurance, I finally agreed to speak with her about Gene Hughes and I told her what Jackie Gauthier my

secretary when I was in the Employee Relations Department and Mr. Hughes secretary at that time had told me about him. Ms. Gauthier had never told me that Gene Hughes had ever said anything inappropriate to her but that she had heard him make risque statements to others. I told her that another employee Dianne Proffitt had told me that Gene Hughes would often use the phrase "bite me" and would engage in inappropriate gesturing with her and that when Dianne Proffitt would have to fax documents Ms. Proffitt would have to go into Gene Hughes' office and would ask him to move so that Ms. Proffitt could use the fax machine. Gene Hughes would reply that Ms. Proffitt just wanted to get close to his body. Ms. Proffitt would then tell him to either move or he could fax the documents himself.

8. After this meeting with Ms. Frazier, I was contacted by Jennifer Bozeman at least 1- 2 times per week about various other Human Resources issues which I thought was strange because I had been replaced in that department by Gene Hughes when Pedro Garcia became the Director of Schools for Metro. In one of these conversations she informed me that both Pedro Garcia and Gene Hughes had been made aware of the sexual harassment complaints. I was also given the status of Veronica Frazier's investigation.

9. One day I was speaking with Jennifer Bozeman and I asked that Veronica Frazier not put my name in the report I asked this because I was afraid of retaliation. We spoke at length about the investigation and I was informed by Ms. Bozeman that she couldn't tell me how many fishing expeditions people have

been on down there (i.e. Department of Education) trying to find out who filed the claims.

10. The day that the report was sent to Pedro Garcia, I was contacted by the Human Resources department for Metro and was told that the report was completed and I could come down and get a copy. On that Monday, I called Human Resources to get a copy and I was told that I would have to wait to see how they wanted to do this. A couple of days went by and I didn't hear anything so I called Human Resources and was told that there had been some problems. I was told that I would have to request the report through Dr. Pedro Garcia's office. I told her that no I was told that Human Resources would give me a copy of the report. Human Resources then told me that Gene Hughes' attorney had requested that they keep others from getting a copy of the report. I told her you can't do that this is a public document. I am entitled to that report. I told her there's obviously something in that report you don't want me to see. I left and sent an e-mail to Pedro Garcia, Jennifer Bozeman and Veronica Frazier that I wanted to see the report. Several days later, I got an e-mail from Pedro Garcia stating that he had received my request and would have Julie Waters, his secretary, provide me with a copy of the report. The next day I went to Pedro Garcia's office to get my copy of the report. I was mortified to see my name on the front page of the report as being one of the individuals interviewed by Veronica Frazier.

11. I left Pedro Garcia's office and walked back to my office. When I arrived in my office Julie Williams, Assistant

Superintendent of Human Resources was waiting for me and placed me immediately on administrative leave.

12. I was charged with embezzlement and on February 11, 2002, I entered into a diversion pursuant to TCA 40-35-313 and the findings were deferred. I did not report this to Metro because I was on diversion and a finding of guilt was never entered.

13. I am very familiar with the procedures used at Metro with regard to obtaining proper certificates in the State of Tennessee. I know that Gene Hughes was placed on the yearly roster for certificated staff. The State requires Metro to fill a listing of all of its new certificated employees. If a certificate is not obtained the State will inform Metro of the reason why the certificate was not obtained. Thus, if Gene Hughes certificate was revoked in the State of Florida the State of Tennessee would know this and would inform Metro of this.

14. Dianne Proffitt worked in my department. She did not do clerical work but rather it was more of an administrative job. She would investigate OJI benefits and would actually make the decision with regard to accepting or denying claims.

FURTHER AFFIANT SAITH NOT.

/s/ Tamara Sadler
Tamara Sadler

Sworn and subscribed before me
this the 23rd day of July, 2004.

/s/ Joellyn A.. Kott
Notary Public

My Commission Expires 03/22/08

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DIANNE B. PROFFITT	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:03-0587
	)	Case No. 3:03-1167
THE METROPOLITAN	)	JURY DEMAND
GOVERNMENT OF NASHVILLE AND	)	
DAVIDSON COUNTY, TENNESSEE	)	Judge Trauger
DR. JULIE WILLIAMS, DR. GENE	)	Magistrate Judge Brown
HUGHES AND DR. PEDRO GARCIA,	)	
Defendants.	)	

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

AFFIDAVIT OF DIANNE B. PROFFITT

I, Dianne B. Proffitt, after being duly sworn in accordance with law do hereby swear and affirm that the foregoing information is true and accurate to the best of my personal knowledge, information and belief.

1. I was employed by The Metropolitan Board of Education of Nashville and Davidson County, Tennessee for over 29 years first as a teacher and then being promoted to a principal. I stopped working as a principal in November 1999 due to health problems. Because I wanted to continue to work, in November

1999, I began to work part time in Employee Relations while still employed as a principal. I was told by Graciela Escabedo that the office was a mess and had been that way for approximately 5 years. She told me that the office was under staffed. In fact, even after I began to work here Graciela Escabedo told me that we needed one more position filled.

In June of 2000, I retired and then began to work part time for The Metropolitan Government of Nashville and Davidson County, Tennessee as an Employee Relations Specialist in the Human Resources Department at the Board of Education. I worked for the Board of Education for approximately two years after my retirement on a part time basis. The General Assembly had recently passed legislation that would allow a teacher retiree to return to limited full-time employment as a K-12 teacher without loss of a pension so long as the employee did not work over 100 days in a twelve month period. I was not working as a teacher and so I contacted the Retirements Benefits Department and received a letter from the supervisor of the Retirement Benefits and the Tennessee Consolidated Retirement System informing me that my work in the Employee Relations Department would not affect my retirement benefit because it was a non-teaching position.

2. At the time I began working part time for the Board of Education, my direct boss was the employee relations director, Tamara Sadler, and her direct supervisor was Graciela Escabedo, the head of the human resources department for the Board of Education. My part time wage was set at $38.76 per hour by Graciela Escabedo, the head of the department in which I would be

working. The sum of the salary earned and the pension add up to approximately what I would have made if employed full time. Graciela Escobedo was the head of this department until the spring of 2002 and she told me that I was doing a great job and she wanted me to stay and perform this job duty while she was there.

3. In the fall of 2001 Dr. Pedro Garcia became the new Director of Schools and his administration immediately hired Gene Hughes as the Employee Relations Director. Gene Hughes became my direct supervisor, in place of Tamara Sadler.

4. After Dr. Garcia's administration took over, I continued to work in my part time position at the same wage I had worked at before Dr. Garcia became the Director of Schools.

5. No one questioned me at all about my salary or made any statement to me about my salary or my hours worked or my status. In fact, Gene Hughes the new Employee Relations Director asked me numerous questions about the department and I helped him become familiar with the departmental procedure. The Board of Education asked me to be a mentor to Gene Hughes and to show him the ropes. I told him what to do during this period. I explained to him the procedures and told him how to do his job. During this period I was working on both Teacher of the Year and summer school functions. I was working 3-4 days per week. I was not a clerk rather I had extensive administrative duties. I was responsible for investigating the on the job injuries claims and I made the decisions as to whether or not the claims were valid and what should be paid, I worked on the Vanderbilt mentoring programs where I would call and set up dates for the teachers to do

their in service and obtain substitute teachers for when the teachers would be in training. I was in charge of the whole administrative part of this program at Metro. I worked on Teacher of the Year, I was responsible for obtaining donations and I had to select the committee to make the decision on who would be the actual teacher of the year. I was responsible for sending out invitations and creating the publication with regard to the events. I had to make all arrangements for the event, create the menu, obtain the facility and make sure that we didn't go over the budget I also had to arrange the breakfast for the Teacher of the Year. I also did extensive work on the sick bank.

6. In the Spring of 2002, Dr. Pedro Garcia hired Dr. Julie Williams to be the new head of the Human Resources Department replacing Graciela Escobedo and Dr. Williams started on June 3, 2002.

7. The week of June 3, 2002, Dr. Julie Williams asked all of the employees under her to fill out a form requesting that we provide her a job description of what we did and asked us if we had any concerns and asked us to return the form back to her.

8. The week of June 3, 2002, I filled out this form and I took the form to Gene Hughes and asked if there was any thing else that he thought that I should put on the form and he told me no that's fine everything looks good. I then returned it to Dr. Williams. She looked at my form and asked me if I had any concerns and I told her no but that I might have some later. She then told me that she had put me in the budget for next year for 2-3 days per week. I told her great I'm excited about that.

9. It is my understanding that Dr. Williams asked all the heads of all the departments how they wanted jobs funded. To my knowledge this is the same procedure used by Graciela Escabedo when she was the head of the human resources department. The department heads would then have input into the decision with regard to what position should be funded within each department. My department where I worked on a part time basis was headed by Gene Hughes.

10. In 2002, Jennifer Bozeman, an attorney for The Metropolitan Legal Department, contacted the Human Resources Department about a potential sexual harassment complaint with regard to Dr. Gene Hughes, the Director of Employee Relations for The Metropolitan Nashville Public School System.

11. Because Dr. Gene Hughes was responsible for EEOC investigations, including complaints of sexual harassment, Metro Legal requested that Veronica Frazier, from the Metro Human Resources Department (not the Board of Education Human Resources) investigate this complaint.

12. In the course of the investigation, on June 17, 2002, Veronica Frazier contacted me wanting to speak with me about some concerns but did not go into detail.

13. On June 24, 2002 I went to my appointment with Veronica Frazier and she told me that she was investigating a sexual harassment claim. I asked Veronica Frazier who was the individual involved and Veronica Frazier informed me that it was Dr. Gene Hughes and asked the Plaintiff if she had seen Dr. Hughes engage in any inappropriate behavior. I, at that point told Veronica Frazier

that I was very concerned and felt that I would lose my job if I participated in this investigation. I was assured by Veronica Frazier that that would not happen.

14. Based upon this assurance, I informed Veronica Frazier that Dr. Gene Hughes would often use the phrase "bite me" and would engage in inappropriate gesturing. I also informed Veronica Frazier that when I would have to fax documents I would have to go into Dr: Gene Hughes' office and would ask him to move so that I could use the fax machine. Dr. Gene Hughes would reply that I just wanted to get close to his body. I would then tell him to either move or he could fax the documents himself.

15. I was informed by that other witnesses informed Metro of other inappropriate words and conduct by Dr. Gene Hughes.

16. Upon completing the investigation Metro did conclude that Dr. Gene Hughes did participate in inappropriate and unprofessional behavior.

17. In the fact finding report it was noted that more than one witness referenced their perception of Dr. Hughes' arrogance and penchant for grabbing his crotch.

18. It was also determined that two of the witnesses were "especially fearful about loss of their job. The witness's apprehension about participating in this investigation was greater than fact finders would reasonably expect."

19. After I had been contacted by Metro about the investigation of Gene Hughes, his demeanor towards me changed.

He would not come out and sit down and speak with me about the cases or anything else. He would just go straight to his office.

20. After fully cooperating with The Metropolitan Government's investigation of Dr. Gene Hughes, on June 28, 2002, I received a phone call from Dr. Julie Williams, the head of the Human Resources Department at that time, telling me not to report to work any more because there was no money in the budget for my employment any longer.

21. Dr. Julie Williams sent me a letter dated July 9, 2002 confirming my termination.

22. I was never asked to work at a lower rate of pay and would have done so if asked.

23. Besides performing employee relations functions I also did work on the summer school program.[1]

---

[1]In performing the summer school functions, I had to make sure that the Board of Education had enough teachers lined up to teach the summer school program and we needed to know what courses were being taught at what school. I had to hire the teachers and in a couple of cases I had to let some of the teachers go because they were not working out. I also had to get the principals that would be in charge. I would help Emily Stinson when the Board did an in-service with the principals to go over what was expected. Additionally, I had to help with the data processing as far as how data was entered because we were hoping that the new process we had was less time consuming, but it was not. Also, I had to assist in administering the Gateway. I also had to go to the schools when we had complaints about principals not being in the

24. I had worked on the summer school program in the summers of 2000 and 2001. I additionally did extensive work on the summer school programs in the fall and spring semesters while I was also doing work in the employee relations department.

25. Emily Stinson headed up the summer school program and was my direct supervisor on all summer school work.

26. I was scheduled to work on the summer school project and so after Dr. Julie Williams called me, I contacted Emily Stinson that night and I told her that Julie Williams had just called me and told me that she no longer needed my services because there was no money in the budget. I asked Emily Stinson, who was in charge of the summer school program, what she wanted me to do about that, did she want me to complete the program. I asked her this because I had always worked on the summer school program after retiring. I had already performed many job functions with regard to summer school in the spring of 2002.

---

building or not being reachable to see how things were going and to check up on the principals and the teachers.

I had to send the applications out to the teachers who were interested in working in summer school and when I received back the applications, I had to find out whether or not the teachers were endorsed in the areas they said they were endorsed in. I then had to help prepare the preliminary report for the state department. I had to deal with the state department because we would get fined if we did not do things properly.

27. Emily Stinson, who was in charge of the summer school program, told me that yes she wanted me to complete the program. I then asked her is there money in the budget for me and Emily Stinson informed me "yes".

28. She then requested that I come to work on July 1, 2002, which was a Monday. When I came into work that Monday I asked her again is this okay, is there money in the budget and she told me "yes, no problem." She told me that the summer school budget is already set and I said fine.

29. While I was working on the summer school program, Emily Stinson signed off on my time records. When I was working for Emily Stinson, I did not need Dr. Julie Williams to sign off on my time sheets because I was not working in her department.

30. When I agreed to work for Ms. Stinson on the summer school project, it was agreed that I would receive the same rate of pay that I had been receiving from the Board of Education, which was $38.76.

31. I worked on the summer school project until September of 2002 and I finished the work in August 2002. I received pay for the hours that I submitted on my timesheets (except for the last few timesheets) and no one questioned my rate of pay or the fact that Stinson was signing my timesheets.

32. Emily Stinson would sign off on my. time sheets which showed that I was being paid $38.76 per hour.

33. After the summer school project was finished, Emily Stinson called me at home and asked me to come back to work at the Board of Education in August of 2002 to work on the

Gateway project. I agreed to do this and I did perform work for the Board of Education on the Gateway project.

34. On August 28, 2002, the Learning Support Consultant, Emily Stinson, who was my immediate supervisor called and informed me that Dr. Sandy Johnson wanted her to finish the my payroll so they could close the summer school account and informed the me that there was a question about the my pay, but that Ms. Stinson had explained to Dr. Johnson that this was the same amount of pay that I had received in previous years and had been receiving this pay from the very beginning.

35. On August 30, 2002, I did not receive my paycheck.

36. On September 4, 2002, I went to the Board of Education and was informed by the payroll coordinator that a check was not issued because Emily Stinson had given the payroll coordinator all of my hours and requested that I be paid in full for all work. This check was issued and I deposited it in my personal bank account.

37. On September 4,2002, Dr. Julie Williams called me at home and she told me that she had stopped payment on the check stating that she needed to verify the dates that I had worked. It was after I had submitted my last time sheets to Metro that I was informed by Dr. Julie Williams that I was not going to be paid at the rate of pay that I had previously received despite the fact that the work had already been performed. The pay was reduced from $38.76 per hour to $15.04 per hour the rate paid summer school

teachers. The Metropolitan Government stopped payment on my last paycheck that was issued in the amount of $4,322.45.

38. I had fully performed all job duties required by me of Emily Stinson on the summer school program and had done so based upon the representation of the Board of Education that I would receive pay of $38.76 per hour. It was after I had fully performed my job duties that Dr. Julie Williams informed me that she was not going to allow me to be paid at that rate of pay.

39. When I worked in the Human Resources Department and the Employee's Relations Department, I would not turn my time sheets in at the end of each pay period. Rather, because I was working only part time, I would turn my time sheets in on a gradual basis so that I would have more of a steady income. For instance, if I worked 30 hours one week and 15 hours the next and 10 hours the next, I would save some of my time sheets from the 30 week time period and would turn it in on the week I would work only 10 hours so that I would receive a steady amount of pay. Before ever doing this, I spoke with Graciela Escabedo about this and received her full approval for turning in my time sheets ht this manner. Additionally, when I went to work for Emily Stinson in the summer school department I, likewise, received her permission to turn my time sheets in this fashion.

40. My position was eliminated, my paycheck was stopped, my pay was reduced by more than 60%, I was sued by Metro and I have not been allowed to return to work at Metro all in retaliation for participating in the sexual harassment investigation of Gene Hughes.

41. Gene Hughes told me that he was a lawyer and that he played professional football for the Pittsburgh Steelers. He kept a picture of the team in his office. It was common knowledge that he had played professional football for Pittsburgh. I heard him tell numerous employees of this.

42. The $15.04 pay limit only applied to teachers, it did not apply to employees working in the central office. I worked in the central office. The $15.04 rate was negotiated with the State of Tennessee as part of the career ladder program for teachers. The teachers had to be working directly with students. I was not working directly with students.

43. I applied for another position with Metro and received a reply form Metro that the job was being taken off the table.

44. I was already working for Metro at the hourly rate of $38.76 before Dr. Johnson ever came to Metro.

45. The general practice at Metro was that the retirees who wished to work in the system would be hired over others. After I left Metro, employee relations hired Ms. Burnett, a part time employee just to work on the Teacher of the Year. I would have done this work if requested. Ms. Burnett is not a Metro employee.

45. I told Veronica Frazier that my position had been eliminated as a result of retaliation. Metro did no investigation of my complaint.

46. When the stop payment was issued on my paycheck, I told Dr. Williams that was done by her in retaliation for participating in the investigation of Hughes.

47. No investigation was done with regard to this complaint of retaliation.

FURTHER AFFIANT SAITH NOT.

/s/ Dianne B. Proffitt
Dianne B. Proffitt

Sworn and subscribed before me
this the 28th day of July, 2004.

/s/ Kristina M. Cochran
Notary Public

My Commission Expires 03/31/07

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DIANNE B. PROFFITT	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:03-0587
	)	Case No. 3:03-1167
THE METROPOLITAN	)	Judge Trauger
GOVERNMENT OF NASHVILLE AND	)	
DAVIDSON COUNTY, TENNESSEE,	)	
ET AL.,	)	
Defendants.	)	

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

AFFIDAVIT OF VICKY S. CRAWFORD

I, Vicky S. Crawford, after being duly sworn in accordance with law do hereby swear and affirm that the foregoing information is true and accurate to the best of my personal knowledge, information and belief.

1. I am Vicky S. Crawford; I am a citizen and resident of Nashville, Davidson County, Tennessee who was employed by The Metropolitan Government of Nashville and Davidson County, Tennessee as a payroll coordinator for over 30 years.

2. Dr. Pedro Garcia brought in as part of his administration Gene Hughes and appointed him the Director of

Employee Relations for The Metropolitan Nashville Public School System.

3. In the fall of 2002, Jennifer Bozeman, an attorney for The Metropolitan Legal Department, contacted the Human Resources Department about a potential sexual harassment complaint with regard to Gene Hughes, the Director of Employee Relations for The Metropolitan Nashville Public School System.

4. Because Gene Hughes was responsible for EEOC investigations, including complaints of. sexual harassment, this sexual harassment complaint with regard to Gene Hughes was brought to the attention of Dr. Pedro Garcia.

5. In the course of this investigation, the officials at Metro contacted me about Gene Hughes and I was questioned. about whether or not she had any information with regard to inappropriate physical conduct or inappropriate behavior on behalf of Gene Hughes.

6. I informed the investigator of highly inappropriate words and actions by Gene Hughes.

7. It is my understanding that other witnesses informed Metro of other inappropriate words and conduct by Gene Hughes.

8. Upon completing the investigation Metro did conclude that Gene Hughes did participate in inappropriate and unprofessional behavior.

9. In the fact finding report it was noted that more than one witness referenced their perception of Mr. Hughes' arrogance and penchant for grabbing his crotch.

10. It was also determined that two of the witnesses were "especially fearful about loss of their job. The witness's apprehension about participating in this investigation was greater than fact finders would reasonably expect."

11. After fully cooperating with The Metropolitan Government's investigation of Gene Hughes, in November of 2002, I was suspended from my job with Metro stating that Metro was investigating whether or not I had embezzled money from the district.

12. On November 9, 2002, Dr. Pedro Garcia told the Tennessean that the employee was suspended with pay after her keys were confiscated and I was sent home from the central office Thursday, and that the lock to my personal office has been changed.

13. Dr. Pedro Garcia told the board members he would not identify the woman or the amount of money involved. Dr. Pedro Garcia added that the officials have yet to determine if the alleged embezzlement is related to drug use.

14. On November 22, 2002, Metro officials informed the Tennessean that they were meeting on Friday, November 22, 2002 to determine whether charges of embezzlement should be brought against me. In this conversation with the Tennessean, I was identified as being Vicky S. Crawford.

15. Chris M. Hensen, told the Tennessean "a preliminary report revealed questionable financial procedure, but no criminal activity to embezzle money from the system."

16. On November 23, 2002, the Tennessean published an article stating that Metro officials had informed the Tennessean that Metro did not know whether or not money was missing from the school district or whether a payroll employee should be charged with embezzlement. I was identified as Vicky S. Crawford in this article.

17. I would state that statements made by Dr. Pedro Garcia, Chris M. Hensen, and the Metro officials are false. I did not engage in embezzlement, drug use, or procedural irregularities.

18. I would state that the Defendants defamed me, not as a result of any legitimate investigation, but did it willfully and intentionally because I honestly answered Veronica Frazier's questions with regard to inappropriate conduct by Gene Hughes and the Defendants set out on an intentional and willful course of conduct to fire me after I told Veronica Frazier about Gene Hughes' inappropriate conduct.

19. I was fired on January 6, 2003 after having been put on administrative leave on November, 6, 2002.

20. I told Metro that I was being retaliated against as a result of my participation in the investigation of Gene Hughes.

21. I participated in an administrative hearing and Joe Sullivan the KPMG investigator who was hired by Metro to investigate me testified that he was told not to put his findings in writing. He allegedly found checks in my office however my office processes approximately 25,000 employee checks and approximately 1,000 vendor checks per month. He did not conduct any investigation to determine if these checks were voided checks

and he had no idea whether or not the checks were voided. He found no evidence of embezzlement.

FURTHER AFFIANT SAITH NOT.

/s/ Vicky S. Crawford
Vicky S. Crawford

Sworn and subscribed before me
this the 26th day of July, 2004.

/s/ Barbara Jan Fisher
Notary Public

My Commission Expires 05/29/2005

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CASE No. 3-03: 0587

DIANNE B. PROFFITT
Plaintiff,
v.
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; DR. JULIE WILLIAMS; DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.
_____/

Law Offices of Steiner & Steiner
214 Second Avenue, North
Nashville, TN 37201
Tuesday, 1:00 - 3:15 p.m.
April 13th, 2004

DEPOSITION
of
TAMARA SADLER

taken without notice.

CASHNER & ASSOCIATES, INC.
An Association of Professional Court Reporter
1123 Lischey Avenue
Nashville, TN 37207
Office 615-618-0353 Fax 615-262-0075

A. She told me that he made her uncomfortable and that -- we discussed it. That we were kind of shocked that he would act that way, in the capacity that he was in.

Q. And what did she say he was doing to make her uncomfortable?

A. I think the fax machine, best I can recall, was located right next to him; and that she would always have to do a lot of faxes and he'd say, you know you're just coming over here because you want to be close to me and grabbing his crotch, in front of her. Just really inappropriate comments.

Q. Can you think of anything else, specific?

A. No, that's really all I can think of.

Q. You also mentioned Faye Goodman.

A. Uh-huh.

Q. What did she tell you about Gene Hughes?

A. One of the first things, Faye was put out with him on some situation. I can't remember what it was, but very early, when he came there; and he had called and left a message on her machine, talking about how many goobers there were in Nashville, Tennessee. And she took that to mean, insinuate that we all were stupid. And that offended her. And then, he had -- there was a case involving some sexual

METROPOLITAN NASHVILLE PUBLIC SCHOOLS
METROPOLITAN NASHVILLE-DAVIDSON
COUNTY, TENNESSEE

2601 BRANSFORD AVENUE
NASHVILLE, TENNESSEE 37204

GARCIELA I. ESCOBEDO
ASSISTANT SUPERINTENDENT
HUMAN RESOURCES
OFFICE: 259-8610 FAX 259-8623

August 23, 2001

Mr. Eugene P. Hughes

Dear Mr. Hughes:

Congratulations. You have been selected as the Employee Relations Director. Your salary will be $82,992 effective August 23, 2001. Please report to Amanda Crutchfield in order to process your paperwork.

If you have any questions or need additional information, please let me know.

Sincerely,
/s/ Graciela I. Escobedo
Graciela I. Escobedo

cc: Gene Foster
Personnel file

Human Resources
2002 - 2003 Fiscal Year Organization Plan

Department/Title	Name	2001 - 2002 Salary/Grade	2002 - 2003 Salary/Grade
Asst. Supt.	**Julie Williams**	**Sr. High Principal**	
Registrar	Amanda Crutchfield	7	9
Sr. Clerk	Torino Frazier	4	4
Receptionist	Lucille Williams	4	4
Licensure Spec.	Clara Sales	9	9
Clerk	Vacancy	4	4
Administrative Asst.	Pam Hauser	7	9
Receptionist (downstairs)	Patsy Shores	4	4

Department/Title	Name	2001 - 2002 Salary/Grade	2002 - 2003 Salary/Grade
Employee Relations	**Gene Hughes**	**Director**	**Director**
Clerk	Jackie Gauthier	7	7
Part-time consultant	Diane Proffitt	Grade 15-24 hrs wk	Same
HR Coordinator of Support Services	**Jo Patterson**	**14**	**15**
Analyst (New)	Alice Barnes	9	9
Analyst	Susan Martin	9	9
Analyst	Tammy Carpenter	7	9 (Maybe)
Sr. Clerk	Sue Gabany	6	6
Sr. Secretary	Teresa Stokes	7	7

Department/Title	Name	2001 - 2002 Salary/Grade	2002 - 2003 Salary/Grade
Coordinator of Special Services	**Pat McNeal**	**Coord I**	**Coord I**
Sub Clerk	Naomi Hill	6	7
Sub Clerk	Belinda Holland	6	6
File Clerk	Lauren Cobb	4	4
Sr. Clerk	Gale Payne	4	4
File/Comm Clerk	Vacancy		4 (Maybe)
Elementary Dir.	**Kay Stafford**	**Director**	**Director**
Sr. Secretary	Betty Wright	7	7
Sr. Clerk	Cheryl Johnson	4	4
Sr. Clerk	Susan Davis	4	4

Hughes, Gene

From: Puckett, Shannon
Sent: Thursday, June 27, 2002 4:28 PM
To: Hughes, Gene
Subject: FW: position costs

I think we have a problem in that this fiscal year to date, we have paid Dianne 177.00 days at 310.08. If she is retired she can only work up to 100 days in a fiscal year. TCRS will retract her pension. Let me know if you need anything else -sp

------Original Message-----
From: Puckett, Shannon
Sent: Thursday, June 27, 2002 3:23 PM
To: Hughes, Gene
Subject: position costs

Listed below are the cost for 12 month positions per request: this includes all benefit cost and increase in insurance and 3% raise that is projected.

Grade 7	total cost of 37,729
Grade 9	total cost of 44,730
Grade 11	total cost of 54,817
Grade 12	total cost of 61,451

Let me know if you need additional info. such as expenditure for part-time position in 2001-2002 - sp

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DIANNE B. PROFFITT
Plaintiff,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Case No. 3:03-1167
JURY DEMAND
Judge Trauger
Magistrate Judge Brown

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

VICKY S. CRAWFORD,
Plaintiff,

vs.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Case No. 03C-1455
JURY DEMAND

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

VICKY S. CRAWFORD,
Plaintiff,

v.

Case No. 3:03-0996
JURY DEMAND

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Deposition of:

JENNIFER BOZEMAN - April 19, 2004

ELITE REPORTING SERVICES
HELEN K. STEPHENS, RPR, CCR
P.O. Box 292382
Nashville, Tennessee 37229
(615) 595-0073

something like that.

Q. Did you think he was arrogant?

A. I don 't know that I dealt with him enough to be able to say that I thought he was arrogant. I just thought he was being very protective of his turf, I guess, of his office.

Q. Did you feel he was hiding information from you?

A. No, no.

Q. Okay. Now, can you recall specifically what Ms. Sadler told you in May of 2002?

A. I remember that she, in regard to -- I believe it was in regard to Ms. Profitt, that she said that -- if my memory is correct, her desk was outside of his office or somewhere right there in the suite physically, that he would make physical gestures, that he grabbed his crotch in front of her once, that he said something when he grabbed his crotch like -- I think it was "bite me" -- or something like that. There was a fax machine in his office that she had to use and she would come in there to use it, and he would make some statement to her about being physically close to him or wanting him or something like that in a sexual way, just the implication of you are trying to get close to my body, whatever her statement was she told me. I remember that.

that had been relayed to me put us on notice that there was an issue that needed to be investigated.

Q. Did you speak with anyone else in your department about investigating this issue?

A. Yes.

Q. Who?

A. I talked to Mike Safley.

Q. What did Mr. Safley tell you you needed to do?

A. When I got back from meeting with Tamara, I did go talk to Mike Safley. And Mr. Safley verbalized what I had already concluded just from a legal perspective, which was, again, we are on notice now that there are facts out there. Whether someone has formally complained or not, it doesn't matter under the law, we are on notice. Therefore, there needs to be an investigation to determine whether there is or isn't anything behind those statements.

Q. Did you inform Ms. Sadler of this?

A. I don't remember ever telling her I did that.

Q. Did you inform Ms. Sadler in this conversation that it would have to be investigated?

A. Like I said, I don't remember if I did or didn't. I'm inclined to say I didn't, but I may have said something to her about it.

Q. Is it a fair statement, then, that when

because that's what they do a lot of.

So I then went back to my office and placed a call to Dr. Garcia just to fill him in on what was going on because, you know, he, as of that point, was out of the loop. Gene Hughes was one of his administrators so he needed to he brought into the loop. So I placed a call to him; he did not return my call that day.

In the meantime, we set up -- Billy Lynch was out of his office for the day so we had set up a conference call for the next morning with Billy. Mike and I had a conference call with Billy on a Friday morning - - no. We talked to him on Monday morning, I think.

I talked to Dr. Garcia on Friday afternoon. He called me from his car phone and I explained to him what was going on and I explained to him that Mike had suggested that we contact Billy to see if there were any investigators in their department, since they were trained investigators, who could assist him. Dr. Garcia said, That's fine; makes sense. So we went ahead then with our conversation with Billy on Monday morning, and Billy agreed and he assigned the investigation to Veronica Frazier.

BY MS. STEINER:

Q. Okay. Now, did you know of any other employees who made statements about having difficulty working with Gene Hughes?

her job, but she didn't -- I don't remember what her exact words were.

Q. Sure. If she says that she specifically told you that she thought that she was going to end up losing her job over this, would you have any reason to dispute that?

A. I can't-- I don't have the specific memory of it, so I can't dispute that.

Q. Do you recall assuring her that she would not lose her job?

A. I recall reminding her that someone who makes a report of sexual harassment or any form of discrimination, has certain protections legally. I remember reminding her and saying, You know that; from your own experience in that office you know what the rules are.

Q. Besides reminding her of the rules, did you speak with anyone else to make sure that there would not be any retaliation ongoing against Ms. Sadler?

A. I can't -- the only thing that I remember saying was in a follow-up conversation with Dr. Garcia, just going over with him like I had done with her, you know, what the rules are for investigations and making sure for my sake so that I would make sure I was comfortable that he understood how these processes go and what the rules are. So in that regard, I did discuss the

Q. - - to try to determine who had-actually made the complaint?

A. No, I did not.

Q. Did you make any statements similar to that to Ms. Sadler?

A. No.

Q. Did you make any statements at all about you or anyone else being questioned about who had been the complaining parties?

A. No.

Q. Did you have any conversations with Gene Hughes about this investigation?

A. Not just the two of us. He was present in the meeting where Veronica Frazier met with Dr. Garcia and Mike Safley and me. Veronica met with him to just give him an outline of, Here is how I will conduct my investigation in terms of process. I will interview people off campus. I'll generate a report at the end. Just some stuff she was walking him through.

Dr. Garcia called Gene and asked Gene to come and sit and listen because he wanted him to be present to hear what was going on. Because I think Gene had asked him to -- I don't know whether it was on the advice of counselor what, but he had asked him if there was any information being given about process, that he wanted to know what the

Department/Title	Name	2001 - 2002 Salary/Grade	2002 - 2003 Salary/Grade
Middle School Dir.	**Bruce Bowers**	**HS Principal**	**Director**
Sr. Secretary	Joyce Walker	7	7
High School Dir.	**Gene Foster**	**Director**	**Director**
Sr. Secretary	Julie Fulcher	4	7

APPROXIMATE FINANCIAL IMPLICATIONS OF RE-ORGANIZATION

Positions Eliminated

• Henry Gaines - Support Specialist	$58,676.80
• 2 clerk vacancies - grade 4	$38,688.00
	$97,364.80

Additions

• Upgrade Jo Patterson to Grade 15	$ 8,959.20
• Add I Analyst at Grade 9	$30,867.20
• File I Clerk Vacancy	$19,344.00
• Upgrade Amanda Crutchfield to Grade 9	$ 3,330.00
• Upgrade Tammy Carpenter to Grade 9	$ 3,330.00
• Upgrade Naomi Hill to Grade 7	$ 3,330.00
• Upgrade Julie Fulcher to Grade 7	$ 2,000.00
TOTAL	

Total Savings

SUBMITTED ON JUNE 10, 2002

_____ APPROVED

_____ NOT APPROVED - COMMENTS

_____

Signature of Director of Schools

REPORTER'S CERTIFICATE

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

I, HELEN K. STEPHENS., Registered Professional Reporter and Notary Public at Large for the, with offices in Nashville, Tennessee, hereby certify that I reported the foregoing deposition of JENNIFER BOZEMAN by machine shorthand to the best of my skills and abilities, and thereafter reduced the same to typewritten form.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

/s/ Helen K. Stephens
HELEN K. STEPHENS, RPR, CCR
Registered Professional Reporter
Certified Court Reporter, and
Notary Public at Large for
the State of Tennessee.
My Commission Expires: 12/05/04

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DIANNE B. PROFFITT
Plaintiff,

v. **Case No. 3:03-0587**

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL.
Defendants.

Deposition of:

VERONICA THOMPSON FRAZIER

Taken on behalf on the Plaintiff
April 28, 2004

SARAH N. LINDER
Elite Reporting Services
P.O. Box 292382
Nashville, Tennessee 37229
(615) 595-0073

* * *

VERONICA THOMPSON FRAZIER,

was called as a witness, and having first been duly sworn testifies as follows:

DIRECT EXAMINATION

QUESTIONS BY MS. STEINER:

Q. Could you please state your full name for the record.

A. Veronica Frazier.

Q. And do you have a middle

A. T .

Q. T?

A. Uh-huh. Thompson. Veronica Thompson Frazier.

Q. It's my understanding you work for Metro; is that correct?

A. That's correct.

Q. What is your position with Metro?

A. Assistant director of human resources.

Q. And how long have you held that position?

A. I'd have to stop and look, I'm not sure. It's going on two years.

Q. Two years. And what - - who promoted you to that position?

A. Billy Lynch. He's now the director of public

works, but he was the director of human resources.

Q. How long have you been with Metro?

A. Since September 16th, 1994.

Q. And do you have any plans of leaving Metro in the near future?

A. No.

Q. What is your home address?

A. 713-A Crescent Road.

Q. Is that in Nashville?

A. That's correct.

Q. Now, as the assistant director of human resources are you responsible for investigating complaints of discrimination at Metro?

A. Yes.

Q. When you investigate those complaints, is there a procedure that you follow?

A. Yes.

Q. What is it?

A. Depending on where we get the complaint from, whether it's an employee or manager, we interview the employer, try to ascertain exactly what is the nature of the complaint. Some complaints don't rise to the level of an EEO investigation and some do. Those that do, we get the pertinent information from the employee including the list of individuals that we'll need to interview. We -- at

A. Absolutely, every single time.

Q. And also, it looks like you send letters as well, don't you?

A. Uh-huh.

Q. Is that a yes?

A. Yes, I do. Yes, I do.

Q. And is it your procedure to send a letter to all parties involved that there can be no retaliation?

A. If I don't send a letter, we'll make it verbal or we'll have an e-mail that will say that.

Q. What makes you decide as to whether or not it's verbal, or e-mail, or letter?

A. I may be -- well, I may be directly communicating with the department head; the request may come from them. And I'll say, remember as we go forward with this investigation -- but that is something that I am really adamant about, be careful, retaliation is an issue, you may feel like -- whatever. I make sure .

Q. And it sounds like you inform the department head and the supervisor that they cannot retaliate against the people who have made the complaint, correct?

A. The person's -- the individual's direct supervisor?

Q. Yes.

A. Now, I may not have direct conversation with that supervisor every single time, but I let management in that

department know, whether it be the department head, division manager, and it may be the supervisor, but folks are made aware, absolutely.

Q. And is it a fair statement, too, that you let the department head know that he's supposed to pass on the message to the supervisors that there can be no retaliation?

A. Certainly .

Q. And so then the department head would tell the supervisor who would tell the alleged harasser that they cannot engage in any retaliation?

A. Right.

Q. And that's done from the word go when the investigation first begins?

A. Absolutely.

Q. So then is it a fair then that the department head, supervisor, and the alleged harasser know the individuals who have made the complaint and know that they cannot retaliate against those individuals?

A. That's a fair statement and that's something that I advise. Now, can I absolutely have 100 percent confidence, I'd like to but ...

Q. And that's a procedure that you use at Metro?

A. Yeah. Absolutely.

Q. Now, how does your department of human resources

he said, do you -- will your schedule permit that because we're responsible to a lot of folks on our side of the government and I said, yes. He said, well, then if you can accommodate, then do; something to that effect.

Q. And was that Mr. Lynch?

A. That was Mr. Lynch.

Q. Okay. And so you agreed --

A. Then we said yes.

Q. - - to do that? And so then you used your typical procedures and policies that you use in conducting investigations?

A. Right.

Q. Now, what was the next step that you took in doing this investigation?

A. I met with -- talked with Jennifer. I can't remember whether we met face to face or talked to get some of the particulars. And then we met with Dr. Garcia and that's where I gave my comments and observations about retaliatory actions. We also advised that Mr. Hughes be removed from doing any sexual harassment investigations because it was -- one was being conducted about him. We thought that would be an inappropriate way to proceed.

Let me see. And how we would set up - - contact folks. If memory serves me, there was some difficultly because it was summer and folks were on vacation. because we

had some lapses trying to set up interviews with folks, so we were contacting folks directly. And I think we had some conversations because we always ask may we contact folks directly or do we need to go through -- so here we contacted folks directly, I believe.

Q. Now, in the initial conversation with Dr. Garcia, did you go to his office or was that over the telephone?

A. We were in his office.

Q. And that's the one where you gave your typical speech -- excuse me, not speech. But you made your typical stacements about how you cannot retaliate against these individuals who had complained?

A. Right.

Q. And so at that point, did you tell them the names of the specific individuals?

A. No, I don't believe we talked about -- I don't remember if we talked about specific -- I'm trying to recall. We had -- we had -- Tamara Saddler is a name that comes to my mind, Dianne, and there were some other folks, but employees in HR. And I can't remember when we made it clear to Dr. Garcia that these -- these complaining employees -- I used the term it may feel like these folks are holding your workplace hostage, and in a way they are, but you must be careful and not proceed with actions that could be perceived as retaliatory.

Q. Okay.

A. And I'm sorry about my recollection of this but it's just been too long ago.

Q. That's fine. But you do know that Ms. Saddler was one of the employees?

A. Ms. Saddler, Dianne Proffitt. And I'd have to go back, I don't have the folder in front of me.

Q. What about Vicky Crawford?

A. I'm not sure when we got Vicky Crawford's name.

Q. Okay. So her name could have come into the picture a little bit after the - -

A. After, uh-huh.

Q. -- first meeting? But at the first meeting, thought, you can recall --

A. I can recall Ms. Saddler. I don't want to say a hundred percent Dianne Proffitt. I'm not certain there. I'm not trusting my memory right now.

Q. Okay. Is it a fair statement, though, that when you found out the names of the other people who were involved in this, you told them likewise you cannot retaliate?

A. I don't know if we went over every specific individual but we said those folks who participate in the investigation should not, again -- should be able to go forward without fear of retaliation?

position had been eliminated and that she thought it was retaliation?

A. Yeah.

Q. When she told you - -

A. I don't know that she said retaliation. I think she what I remember, she was very upset and she felt like she had been -- that it had happened because she had participated in this investigation.

Q. When she told you that, did you or anyone in you department investigate that?

A. We would not investigate something on the board of education. The only reason we were there at the beginning is because we had been asked to.

Q. Did you notify anyone?

A. I had a conversation with Jennifer Bozeman about that.

Q. And did you or Jennifer Bozeman direct Ms. Proffitt to file a complaint of retaliation with any other department at Metro?

A. I can't speak for Jennifer Bozeman. And I have no recollection of it.

Q. When Ms. Proffitt contacted you about the retaliation, was Gene Hughes still in charge of the employee's relation department at the board of education?

A. I have no idea.

Q. Did you tell the people when they were participating in this investigation that if they get retaliated against that there's no one at the Metropolitan Board of Education human resources department that they should contact?

A. No.

Q. Did you make any statements to these employees that if they were retaliated against that it would not occur, retaliation would not occur?

A. I told these employees that they were protected against retaliation.

Q. And did you tell them, specific steps that they needed to take if they were retaliated against?

A. I explained to employees they have recourse. And I think that is why Dianne Proffitt called me.

Q. Now, Tamara Saddler, did she make any statements to you in the investigation about anything that Gene Hughes did or said that was inappropriate?

A. I'd have to look at my notes. I don't recall.

Q. Dr. Julie Williams, did she make any statements about anything that Gene Hughes did that was inappropriate?

A. I don't recall. I'd have to look at my note.

Q. Is it a fair statement then that the only three individuals who made statements about Gene Hughes engaging in inappropriate conduct would be Tamara Saddler, Vicky

Crawford, and Dianne Proffitt that you can recall?

A. Jayme Merritt may have, so I'm not certain. I'd have to go back and look at notes.

Q. But it would be these four: Jayroe Merritt, Ms. Crawford, Ms. Proffitt --

A. May I look at that list of witnesses?

Q. You sure can. (Passes document.)

A. (Reviews document.) I think: that would be fair. I don't recall his secretary saying anything, but I still would like to review those notes before I give an absolute definitive answer. I don't recall.

Q. What department did Jayme Merritt work in?

A. She's board of education. I don't know where.

Q. Do you know if she's still employed there?

A. I have no idea.

Q. (Reviews document.) Now, did you interview Gene Hughes?

A. Yes, twice.

Q. Twice. You do recall the date that you first interviewed him?

A. I don't recall the date.

Q. Would you have that on your calendar?

A. I would optimistically assume.

Q. And the date that you second interviewed him, did you recall the date?

Q. What auditors did you speak with?

A. I don't know their names. They came in from, I believe, KPMG.

Q. Did I say Ms. Crawford? I meant Ms. Proffitt. Did you speak to the KPMG auditors about Ms. Proffitt's job position?

A. No -- well, they -- yeah, I did.

Q. And why did you speak with them about her position?

A. They requested an interview with me, they were doing an audit of the board of education, the human resources -- I'm not sure what they were doing, but it was a financial audit of some aspect of salaries of the board of education.

Q. And they questioned you about Ms. Saddler's salary?

A. They questioned me about --

MR. SAFLEY: Did you mean Ms. Proffitt?

MS. STEINER: Proffitt, excuse me.

THE WITNESS: Yes, they did.

BY MS. STEINER:

Q. Did they question you about anyone else's salary?

A. Yes, they did.

Q. Who else?

A. Well, they questioned me in general about -- during the course of my investigation, they questioned me about Ms. Proffitt and what did I think about someone -- a

retired teacher coming in and making the same salary doing a clerk's work, something to that effect. And they questioned me about -- it was just in general about Tamara Saddler and Vicky Crawford, those were the three folks they questioned me about.

Q. Okay. Do you know who started this investigation?

A. What investigation?

Q. The KPMG investigation.

A. I have no idea.

Q. Do you know why they were questioning you about these three folks?

A. Because I had done an investigation during the course of our investigation -- one of the witnesses made allegations about payroll improprieties.

Q. And that would have been Diane Burden?

A. I believe that's correct.

Q. And no other witnesses made any statements about payroll improprieties?

A. No. When something like that comes to our attention -- I mean, it might not necessarily be payroll, that's out of the realm of EEO issues, but clearly something that I forward on to the appropriate person and I think it was internal audit.

Q. Now, Gene Hughes also made statements about payroll, problems; is that correct?

A. I can't recall that he made - - he may have. He may have.

Q. Well, do you recall him making statements specifically about Ms. Crawford?

A. Yeah. And which clearly would have been payroll problems.

Q. Okay. Did you ask - - did you have any concerns about the auditors being there in your office questioning you about the three employees who had made complaints about Gene Hughes?

A. No. It was after the fact and it was a different topic altogether.

Q. Well --

A. It was a very brief conversation.

Q. Were you concerned at all about retaliation against these three employees when the three employees who had complained about Gene Hughes, their three names were raised to you with questions from auditors?

A. No.

Q. Okay. What were the auditors asking you about Tamara Saddler?

A. I don't recall the specific questions that they asked me about Tamara Saddler.

Q. Do you recall what auditor asked you about Tamara Saddler?

I'm not an auditor.

Q. Where did you get your information from with regard to what her job duties were --

A. I never got -- well, her specific job duties?

Q. That you based your opinion on that you gave back to the auditors.

A. I never gave them any opinions about her job duties. I said, if she were doing a clerk's work; it was certainly not in line with what the top scale pay for a principal is.

Q. And who told you she was doing a clerk's work?

A. Julie Williams.

Q. Okay.

A. Well --

Q. You didn't conduct any investigations to see whether or not she was doing a clerk's work, whether or not she was doing other work?

A. I was not asked to do a job audit; that's somebody else's - - I was looking at an EEO -- sexual harassment complaint. And that's why I referred the other issue to internal audit.

Q. Did you ask the auditors at all or did you have any concerns about who had ordered this audit and this investigation of these three employees?

A. I think that -- I didn't ask the auditors anything,

recollection, I do remember bite me was one that was an allegation made against him and, that, he even acknowledged. And I do recall the banter between Ms. Crawford and Mr. Hughes being inappropriate, unprofessional for both parties. And there were -- more than one witness said that he would grab his crotch, which would be clearly inappropriate.

Q. Well, grabbing his crotch, could that also constitute sexual harassment?

A. I think that if -- certainly, there could be circumstances where it could, but I believe Ms. Crawford engaged -- their conversations and their actions, she acknowledged that she would flip him a bird, that she - - it became banter in what was clearly inappropriate, unprofessional. But they had sort of established that is their interaction in workplace culture, if you will. But it did not make it appropriate and it is clearly inappropriate and unprofessional.

Q. What about the witness that claimed Dr. Hughes entered her office and pulled the witness' head into his crotch, could that constitute sexual harassment?

A. Yeah, we never could corroborate that.

Q. Meaning, you only had one witness?

A. Correct.

Q. And Dr. Hughes denied it?

A. Right. We had no one else who had seen that.

Q. Okay. So then you need two witnesses to corroborate sexual harassment?

MR. SAFLEY: Object to the form.

BY MS. STEINER:

Q. Is that what you were saying?

A. We would not say that the action we were doing a fact-finding report and we tried to present the facts; what the witness said happened. And if we couldn't find a corroboration, we would it would end up being a he said, she said circumstance.

Q. Okay. Who said that Dr. Hughes did that to her?

A. I don't recall.

Q. Do you know who made the statements when they said hi to him, he grabbed his crotch and stated, I'll tell you what's up? Do you recall who said that?

A. I can't recall. I'm just -- since I can't recall, I have an idea but I can't recall specifically.

Q. Is it a fair statement then, though, that several witnesses did make several different statements of him engaging in conduct, if corroborated, could constitute sexual harassment?

A. If corroborated and if he were the only one engaging in that behavior. But from what we -- our investigation when there are two employees, two co-workers,

resume?

A. No, Navy SEAL's not on the resume.

Q. Okay. And that I s the one that he actually brought into your office and gave to you as being his resume?

A. Uh-huh.

Q. And he told you in that conversation that he was a Pittsburgh Steeler?

A. Played for Pittsburgh Steelers, yeah. I mean, it is on the resume too. I mean, that's why I asked; it's got the dates on there too.

Q. Okay. Moving on. When Ms. Burden made the complaints to you about the problems in the payroll department, when she came in to talk to you, and she told you about problems in the payroll department, you forwarded her complaint on to the payroll department is that correct?

A. I forwarded the issue to Metro's internal audit, in fact, to Kim McDoniel who is head of internal audit.

Q. And is that what you were instructed to do? Is that the procedure that you use when you get a complaint into your office if it's something you can't handle, you forward it on to the appropriate department?

A. Yes, exactly, to the appropriate department.

Q. Have you ever gotten a complaint in that you've refused to forward to the appropriate department?

A. I don't recall ever.

Q. If you got a complaint in about the hospital - - and the hospital's different than Metro General; is that correct? Where you work?

A. Yes.

Q. If you got a complaint about the hospital, would you forward that to the appropriate authorities at the hospital?

A. Correct.

Q. Okay. Let me hand you this September 13th, 2002, letter. Did you draft this letter?

A. I sure did.

Q. The same time that you did the fact-finding report?

A. Right.

Q. And you sent this letter out as a result of the information that you obtained in the fact-finding report?

A. Certainly.

Q. The no audit trail from the employee's sick bank, did you obtain that information from Gene Hughes?

A. I'd have to look back at my notes.

Q. It says here that: In order to assist you in your review of this matter, we can provide names of witnesses who may be of help?

A. Uh-huh.

Q. Who would those witnesses be?

CERTIFICATE

STATE OF TENNESSEE
COUNTY OF DAVIDSON

I, SARAH N. LINDER, court reporter, with offices in in Nashville, Tennessee, hereby certify that I reported the foregoing deposition of VERONICA THOMPSON FRAZIER by machine shorthand to the best of my skills arid abilities, and thereafter the same was reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

/s/ Sarah N. Linder
SARAH N. LINDER
Notary Public at Large
State of Tennessee

My Commission Expires: 3/26/2005

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DIANNE B. PROFFITT
Plaintiff,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Case No. 3:03-1167
JURY DEMAND
Judge Trauger
Magistrate Judge Brown

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

VICKY S. CRAWFORD,
Plaintiff,

vs.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Case No. 03C-1455

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

VICKY S. CRAWFORD,
Plaintiff,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Case No. 3:03-0996
JURY DEMAND
Judge Campbell
Magistrate Judge Brown

Deposition of:

DR. PEDRO ENRIQUE GARCIA

Taken on behalf of the Plaintiffs
April 23, 2004

ELITE REPORTING SERVICES
MAX CURRY, B.C.R., RPR, CCR, CRI
Bachelor's Degree of Court Reporting
P.O. Box 292382
Nashville, Tennessee 37229
(615) 595-0073

I made the assumption when I saw the report back in, I think it was like -- whenever it came, September, October. So whenever the report came back, it had the names of witnesses in there, and I assumed that some of those had to have been the people that were -- that made the accusation.

Q. So then, are you saying before the date of the report, you can't recall hearing the specific names of the people who made the accusations?

A. Not officially, no.

Q. Unofficially, did you hear the names of the people that had complained?

A. The only thing that I -- I know is that it was an assumption as to who would have made it.

Q. What was your assumption?

A. My assumption was when I - - I spoke with Gene Hughes right after, and I told him that there was an investigation against him.

Q. Uh-huh.

A. And at that time he indicated that he thought it had to do with Vicky Crawford and Tamara Sadler.

Q. And was this after -- directly after your meeting with Jennifer Bozeman?

A. Yes. And we agreed that I needed to notify him of this investigation, and so I did. I met with him. He came

-- as customary procedure, we go through lots of training and go over procedures and policies, et cetera, for everybody. But not any specifics saying, okay, nobody can retaliate against, you know, any specifics -- saying, okay, these three people are, you know, specifically.

Q. Did you tell Gene Hughes when he indicated to you in your initial conversation that he thought it was Vicky Crawford and Tamara Sadler that he could not retaliate against those two?

A. That's correct.

Q. Now did Ms. Bozeman ever indicate to you that Dianne Proffitt was part of the investigation?

A. Not that I recall.

Q. What?

A. Not that I recall.

Q. What about Ms. Frazier did she ever indicate that Dianne Proffitt was a part of the investigation?

A. Not that I recall.

Q. If she had, if either one of those two had indicated that to you would you likewise have informed Gene Hughes he cannot retaliate against Dianne Proffitt?

A. More than likely, yes.

Q. Likewise, too, would you have informed Ms. Williams that because she was Gene Hughes' supervisor, that she was to make sure that Gene Hughes did not retaliate against

these individuals?

A. If I had known the names of the individuals, would I have then informed Ms. Williams?

Q. Yes.

A. Yes.

Q. okay.

A. More than likely, yes.

Q. Okay. So then, after you had your conversation with Gene Hughes, the initial one, and after he told you that he thought it was Vicky Crawford and Dianne Proffitt, did you have any conversations with Ms. Williams to tell her what was going on and to alert her to the situation?

A. I let her know.

Q. And likewise then, would you have let her know that she's to watch Gene Hughes to make sure he doesn't retaliate against Vicky Crawford and Tamara Sadler?

A. I did not know the extent of the conversation, but I do know that I had a conversation with Ms. Williams informing her of the -- that there was an investigation that was going to take place.

Q. Okay. And it's my understanding that you can't recall specifically what you told Ms. Williams?

A. No. The only thing I -- no, other than that's what occurred.

Q. Sure. But would it have been your normal procedure

REPORTER'S CERTIFICATE

STATE OF TENNESSEE
COUNTY OF DAVIDSON

I, Roy M. curry, Jr., court reporter, with offices in Nashville, Tennessee, hereby certify that I reported the foregoing deposition of DR. PEDRO ENRIQUE GARCIA by machine shorthand to the best of my skills and abilities, and thereafter the same was reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein. nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

/s/ Roy M. Curry, Jr.
ROY M. CURRY, JR., B.C.R., RPR, CRI, CCR
Bachelor's Degree of Court Reporting
Registered Professional Reporter
Certified Reporting Instructor,
Certified Court Reporter, and
Notary Public
State of Tennessee At Large

My Commission Expires: 03/27/05

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

VICKY S. CRAWFORD,
Plaintiff,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DR. JULIE WILLIAMS, DR. GENE HUGHES AND DR. PEDRO GARCIA,
Defendants.

Case No. 3:03-0996
JURY DEMAND
Judge Campbell
Magistrate Judge Brown

Deposition of:

DR. JULIE CASSANDRA BROWN WILLIAMS

Taken on behalf of the Plaintiffs
April 13, 2004

ELITE REPORTING SERVICES
MAX CURRY, B.C.R., RPR, CCR, CRI
Bachelor's Degree of Court Reporting
P.O. Box 292382
Nashville, Tennessee 37229
(615) 595-0073

A. Yes.

Q. And then under them you had the clerical workers?

A. Well, there was one other degreed person there, Henry Gains.

Q. And what was Mr. Gains' position?

A. He was in charge of the custodians and cafeteria workers. I think his title was Human Resource Specialist.

Q. Okay. Now, I want to ask you a little bit about the job duties here. Was there any particular position that was responsible for discrimination complaints? If one came up, who would investigate that?

A. Gene Hughes.

Q. Okay. Now, for - -

A. In the initial stages he would.

Q. And who would have investigated in the latter stages?

A. Well, the appeals process brought it to me, would have brought it to me.

Q. Okay. And then would there have been any step after you?

A. Dr. Garcia.

Q. Okay. Now, the other employees that you had, the three directors for certified employees and the coordinator for the Support and Coordinator for the Substitute Position, what would they do in HR?

Q. And do you know whether or not she was actually convicted of the felony?

A. It said so on the police report that I saw, and I took it to her and asked for an explanation.

Q. And who brought this to your attention?

A. I have no idea. It was left anonymously.

Q. Do you know whether or not Gene Hughes had anything to do with this?

A. No, I don't.

Q. When it was left anonymously, where was it left?

A. On my desk.

Q. Do you know whether or not Tamara Sadler was fired the same day that the report on the investigation of Gene Hughes was passed out?

A. I don't know what date it was passed out.

Q. Did you know that Tamara Sadler had gotten a copy of that report and the fact-finding against Gene Hughes only hours before you walked in and terminated her?

A. No, I did not.

Q. Have you asked anyone who left that on your desk?

A. No.

Q. Where actually was this left?

A. Oh, I don't recall. My -- I know it might seem strange, but I believe in an open-door policy and I still have that. And so, people come in and leave things on top

of my desk, sometimes they leave them in my chair. Usually, if there's something they want me to see, they leave it in a manner to make sure that I will see it.

Q. Okay. And do you recall whether or not this was on your desk or in your chair?

A. Not really. It could -- I really don't remember whether it was on my desk or in my chair.

Q. Do you recall whether or not it was in an envelope?

A. I don't recall.

Q. Do you recall whether or not there was any note with this?

A. No, I don't recall.

Q. Did you conduct any sort of an investigation to determine who actually left that on your desk?

A. No, I didn't.

Q. What did you do with the docu ent when you got it?

A. I took it to Dr. Garcia.

Q. Okay. And what. did you tell Dr. Garcia?

A. I said, "What should I do with this?"

I mean, I get anonymous tips and things like that all the time.

And so he said, "Well, you need to talk to Faye Goodman," who was Ms. Sadler's immediate supervisor, which I did. And he said, "Well, you know, we have to do something about it."

the facts. I did the investigation as such as it is, and I have already told you that it depends on what you call "investigation".

Q. Okay. Now, and in whatever this may be that you call an investigation, is it a fair statement that for both Crawford and Proffitt you didn't interview any witnesses and you didn't keep any notes?

A. That is true.

Q. Now, in the Proffitt matter, I believe that she was working in the Human Resources Department; is that correct?

A. Yes, right.

Q. And was she in that department when you actually came to work in the Human Resources Department?

A. Yes.

Q. And what was her position in Human Resources?

A. I don't really know. She assisted in the -- in Employee Relations.

Q. Okay. Now, did you have any input into the decision to eliminate her job from the budget?

A. I had made that decision. Yes, I did.

Q. And did anyone suggest to you that that decision should be made?

A. Not really.

Q. Did you have any discussions with Gene Hughes about the budget?

A. Yeah.

Q. And did you tell him that you were thinking of climinating Ms. Proffitt's position?

A. I told him and all my directors what I was thinking about doing it.

Q. Okay. And did Gene Hughes indicate to you one way or the other about how he thought about that job?

A. No, not really.

Q. Okay.

A. I asked him what did she do, just like I asked all the other directors what everybody did. They filled out a form when I came on board. Everybody in the department filled out a form in which I asked them, "What do you do?" And because I was coming in new, I didn't know what all the clerical people did, and I didn't know what everybody did.

So, when I found out what everybody did, one of the things I wanted to do, and I had done some research at another district, and I wanted to re-organize it because I already knew some of the problems that were coming up. So I planned to re-organize the department.

Q. And did you have any discussions with Gene Hughes about what Ms. Proffitt did?

A. Yes. I asked him, "What does she do?"

Q. And did he indicate to you that her job was something that could be done by other people?

A. I don't recall his saying that. I mean, I concluded that myself. I mean, I know a little bit.

Q. Is it a fair statement that you concluded that - -

A. Everybody's job could be done by somebody else.

Q. Well, is it a fair job -- fair statement that you concluded that her job should be eliminated based in part on what Gene Hughes told you her job was?

A. No. No, that is not true.

Q. What did Gene Hughes tell you about her job?

A. Nothing except what she did .

Q. Okay. And what did he tell you she did?

A. That she helped out with the Teacher of the Year and other little things that he managed - - that he asked her to do.

Q. Okay. And did you talk to anyone else about her job position?

A. Close to the time that I asked her to leave, I called Dr. Garcia and asked him if there was any reason that I needed to keep Dianne on ,the payroll. And his response to me was, "Who is Dianne Proffitt?"

And so I said, "Well, she works -- she's a former principal and she works in Employee Relations." That didn't mean anything to him. I tried to describe her physically, and it still didn't mean anything to him.

So, he said, "Well, do what you need to do."

Q. So then besides speaking to Gene Hughes and Dr. Garcia about Ms. Proffitt's job position, did you speak with anyone else?

A. No.

Q. Did you speak with Ms. Proffitt?

A. I spoke with her.

Q. Okay. And what did she indicate to you that her job duties were?

A. Well, she came in middle of June, I guess, and she indicated that, you know, she would like to stay with the a department. We had a congenial relationship. I had known Dianne for many years. Everybody was kind of getting to know me and how I operate and what was going on. I came in under some unique kinds of situations. It wasn't a pleasant situation. But I tried to get - - build relationships first.

And so, many of the employees came by and told me different things that they wanted. Some of them -- a lot them said they think they needed more money or whatever. I looked at all that.

Q. Okay. So then, when you made the decision to eliminate her position, did anyone else have any input into. that decision?

A. Not really, huh-uh.

Q. Not really. Did anyone assist you - -

A. When I say, "Not really," I prepared several drafts of a proposed reorganization and I talked with my directors and coordinators about, "Well, what do you think about this? Will this work?"

So yes, we had some discussions in general meetings about things of that nature. And before -- and I changed it over time to try to get the best help that we could.

Q. Did Ms. Proffitt work directly under Dr. Hughes?

A. To my knowledge, yes.

Q. So then, he would have been the one with the most input about what she was actually doing and whether or not her job would be eliminated?

A. I don't think you understand what I have said.

Q. Uh-huh.

A. There was never any mention that Ms. Proffitt was not doing her job or that she was doing it ineffectively. That was not the issue. And the issue -- or that anybody was.

Q. Okay. Is it a fair statement, though, that because she worked under Dr. Hughes, he would be the person in the best position --

A. No. That is not the

MR. YOUNG: Let her finish the question.

THE WITNESS: Okay. Go ahead.

REPORTER'S CERTIFICATE

STATE OF TENNESSEE
COUNTY OF DAVIDSON

I, Roy M. Curry, Jr., court reporter, with offices in Nashville, Tennessee, hereby certify that I reported the foregoing deposition of DR. JULIE CASSANDRA BROWN WILLIAMS by machine shorthand to the best of my skills and abilities, and thereafter the same was reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

/s/ Roy M. Curry, Jr.
ROY M. CURRY, JR., B.C.R., RPR, CRI, CCR
Bachelor's Degree of Court Reporting
Registered Professional Reporter
Certified Reporting Instructor,
Certified Court Reporter, and
Notary Public
State of Tennessee At Large

My Commission Expires: 03/27/05

No. 05-839

In The Supreme Court of the United States

DIANNE B. PROFFITT,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

FRANCIS H. YOUNG
Counsel of Record
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY
222 Third Avenue North, Suite 501
Nashville, Tennessee 37201
(615) 862-6380
Attorney for the Metropolitan Government

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964

QUESTION PRESENTED

To survive defendants' summary judgment motion on a Title VII retaliation claim, does a plaintiff need at least some proof that the decision-maker knew that plaintiff had participated in an alleged protected activity, before the alleged "adverse action" occurs?[1]

[1] Plaintiff tendered the question presented in the following way: "Where it is undisputable that the employer as an entity had knowledge that the Petitioner engaged in protected activity, should the Petitioner's claim be barred because the Petitioner has limited evidence to overcome one of the retaliator's 'bald assertion' [sic] that the retaliator had no knowledge of the Petitioner's exercise of protected activity despite a temporal proximity of four days between the exercise of the protected activity and the elimination of the Petitioner's position."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

So as not to burden the Court with a repetitive narrative of the procedural posture of this case, Respondent Metropolitan Government of Nashville and Davidson County, Tennessee ("Metropolitan Government") adopts and incorporates by reference the District Court's description of the course of proceedings. (App. to Pet. for Writ of Cert. at C11-C12.) The District Court for the Middle District of Tennessee granted summary judgment to the defendants on all counts, dismissed the counterclaim for want of subject matter jurisdiction, and dismissed the plaintiff's motion for summary judgment as moot. The Sixth Circuit Court of Appeals affirmed the District Court's grant of summary judgment to the Metropolitan Government (the only aspect of the District Court's disposition which was appealed), and this Petition for a Writ of Certiorari followed. The Metropolitan Government is the sole Respondent herein because Petitioner did not appeal the grant of summary judgment to any of the individual defendants.

STATEMENT OF FACTS

So as not to burden the Court with a repetitive narrative of the facts of this case, the Metropolitan Government adopts and incorporates by reference the statement of facts of the District Court in its Memorandum. (App. to Pet. for Writ of Cert. at C2-C11.)

SUMMARY OF ARGUMENT

This Court should decline Petitioner's invitation to change the law in the Sixth Circuit regarding the required proof elements of a Title VII retaliation claim. Petitioner's principal argument – that this Court should eliminate the Sixth Circuit's "knowledge of the protected activity" prong of the Sixth Circuit's Title VII retaliation analysis – elevates form over substance. Regardless whether "knowledge" of the protected activity is examined as a separate prong of the analysis or is subsumed into the "causation" element of the *prima facie* case, it is an essential element of such a claim.

Specifically, because Petitioner failed to tender evidence sufficient to create a genuine issue of material fact as to whether Dr. Julie Williams, the individual responsible for the decision to eliminate Petitioner's position, had knowledge of Petitioner's alleged participation in a protected activity, the District Court properly held that Petitioner could not establish a *prima facie* case. This is true regardless of whether the question of Dr. Williams's knowledge is examined as a separate prong of the *prima facie* case or as part of the question as to whether Petitioner's participation "caused" Dr. Williams to eliminate her position. Furthermore, despite Petitioner's argument to the contrary, there are more ways in which a plaintiff can establish a genuine issue of fact as to "knowledge" other than an admission from the lips of the defendant. Petitioner's failure to adduce any evidence of "knowledge" by any means whatsoever resulted in the District Court properly granting summary judgment for the Metropolitan Government.

Additionally, Petitioner may not prevail merely by arguing that the Sixth Circuit's knowledge prong should be eliminated. The only evidence on which Petitioner relies to satisfy the causation prong of the retaliation analysis is the temporal proximity between her alleged protected activity and the elimination of her position. Under Sixth Circuit authority, temporal proximity alone is insufficient to show causation. Additionally, Petitioner's argument ignores clear authority, in the Sixth Circuit and elsewhere, establishing that participation in an in-house sexual harassment investigation that was initiated by someone else and conducted well prior to Petitioner's filing of a formal EEOC charge – as in this case – is not a "protected activity" under Title VII. For that reason, Petitioner has failed to establish the first and fourth prongs of the *prima facie* retaliation case – completely independent of her failure to provide evidence of the "knowledge" prong.

REASONS FOR DENYING REVIEW

I. PETITIONER'S ARGUMENT THAT THE SIXTH CIRCUIT IS IN A MINORITY OF CIRCUITS THAT REQUIRE A SHOWING OF "KNOWLEDGE" OF THE PROTECTED ACTIVITY AS PART OF THE *PRIMA FACIE* CASE ELEVATES FORM OVER SUBSTANCE

As the crux of her argument, Petitioner argues that this Court should alter the Sixth Circuit's well-established articulation of the *prima facie* elements of a Title VII retaliation claim. Under the Sixth Circuit's framework, a plaintiff may establish a *prima facie* case of retaliation by showing the following: (1) that plaintiff engaged in protected activity; (2) that the defendant had knowledge of

the plaintiff's participation in protected activity; (3) that the defendant subsequently took employment action adverse to the plaintiff; and (4) that a causal connection exists between the protected activity and the adverse employment action. *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). Petitioner argues that this Court should eliminate the Sixth Circuit's consideration of the employer's knowledge of the plaintiff's participation in a protected activity as a separate prong of the *prima facie* case.

This argument has already been rejected by the Sixth Circuit in *Mulhall v. Ashcroft*, 287 F.3d 543 (6th Cir. 2002). In *Mulhall*, plaintiff urged the court to relax the requirement that he generate proof of the decision-maker's knowledge of his participation in a protected activity. *Id.* at 551. The court declined to do so. Rather, the Court of Appeals analyzed the distinction between circumstantial evidence of "knowledge" and circumstantial evidence of "causal connection" and found that the two were not interchangeable. *Id.* The court refused plaintiff's attempt to skip past the "knowledge" prong by tendering evidence to show "causation" – evidence that did not include the decision-maker's knowledge. *Id.*

More importantly, Petitioner's argument creates a distinction without a difference. Even if the Sixth Circuit did not require knowledge as a separate prong of the analysis, if the employer did not know of plaintiff's participation in a protected activity, the plaintiff has not satisfied the fourth prong of the *prima facie* case – causation. *See also Thaddeus-X v. Blatter*, 175 F.3d 378, 386-87 & n.3 (6th Cir. 1999) (en banc) (noting that the "knowledge" element is captured by the third prong of the *prima facie* case: the defendant must have known about the

protected activity for such activity to have motivated the adverse action).

Likewise, in this case, if the employer did not know that plaintiff participated in a protected activity, then such participation could not have ***caused*** the subsequent elimination of plaintiff's position. Thus, the fourth prong is not satisfied. Put another way, in the absence of evidence to refute Dr. Williams's sworn testimony that she did not know that Petitioner had participated in an alleged protected activity, there is no genuine issue of material fact as to whether such participation ***caused*** Dr. Williams to eliminate her position.

II. THE RATIONALE BEHIND PETITIONER'S PRINCIPAL ARGUMENT MISCONSTRUES THE PROOF REQUIREMENTS IN A TITLE VII CASE BASED ON CIRCUMSTANTIAL EVIDENCE

In support of her primary argument, Petitioner relies on the general principle in anti-discrimination law that a plaintiff can rarely prove discriminatory intent through direct evidence because such evidence is rarely available. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983); *Kline v. TVA*, 128 F.3d 337, 348 (6th Cir. 1997). However, this rationale is simply inapplicable to the situation at hand.

Contrary to Petitioner's argument, the Sixth Circuit's knowledge prong does not require Petitioner to tender *direct evidence* of defendant's *motive*. The problem for Petitioner is not that she failed to produce direct evidence that Dr. Williams actually retaliated against her. The problem for Petitioner is that she failed to tender any

evidence that Dr. Williams knew of her participation in an alleged protected activity.

Furthermore, Petitioner's suggestion that only an admission "from the lips of" Dr. Williams would suffice to create a genuine issue of fact under the knowledge prong is simply without merit. The Sixth Circuit's knowledge prong does not require Petitioner to tender evidence that Dr. Williams ***admitted*** that she knew of Petitioner's participation in a protected activity; Petitioner merely has to tender evidence of Dr. Williams's knowledge, circumstantial or otherwise, that goes beyond mere speculation. *See Allen v. Mich. Dep't. of Corr.*, 165 F.3d 405, 413 (6th Cir. 1999) (finding a sufficient *circumstantial* case for knowledge of plaintiff's protected activity).

Any number of pieces of evidence aside from an admission by the decision-maker can theoretically be used to refute the decision-maker's testimony. Petitioner's case fails because she has not tendered any non-speculative evidence on that issue. Accordingly, Petitioner's suggested argument that the Sixth Circuit's rationale would have required her to tender direct evidence from the mouth of Dr. Williams is an overstatement at best.

III. ELIMINATION OF THE SIXTH CIRCUIT'S KNOWLEDGE PRONG WOULD STILL REQUIRE AFFIRMANCE OF THE SIXTH CIRCUIT'S RULING

Elimination of the knowledge prong would still require this Court to affirm the Sixth Circuit's ruling in this case for two separate reasons. First, the only evidence of causation tendered by Petitioner in this case is temporal proximity between the alleged protected activity and

subsequent termination, evidence that *alone* is insufficient to establish causation in the Sixth Circuit. Second, participation in an in-house sexual harassment investigation that was initiated by someone else and conducted well prior to Petitioner's filing of a formal EEOC charge, as in this case, is not a "protected activity" under Title VII.

In the Sixth Circuit, temporal proximity between the alleged protected activity and the subsequent adverse action alone is insufficient to establish the causation prong of a Title VII retaliation *prima facie* case. *Balmer v. HCA, Inc.*, 423 F.3d 606, 615 (6th Cir. 2005). Petitioner has tendered no evidence beyond temporal proximity in this case and, thus, has tendered insufficient proof as to the causation prong of the retaliation *prima facie* case.[1]

Finally, the alleged protected activity in this case is Petitioner's participation in an in-house sexual harassment investigation that was initiated by someone other than Petitioner and conducted well prior to Petitioner

---

[1] Despite Petitioner's argument that the Sixth Circuit is in a minority of circuits that require evidence beyond temporal proximity under the causation prong, even cases from circuits that do not require such evidence recognize that temporal proximity is rarely sufficient. *See, e.g., Culver v. Gorman & Co.*, 416 F.3d 540, 546 (7th Cir. 2005) (recognizing that there are "rare occasions . . . where suspicious timing alone is enough to establish causation"); *Zhuang v. Datacard Corp.*, 414 F.3d 849, 856 (8th Cir. 2005) ("More than a temporal connection is generally required to present a genuine factual issue of retaliation."). Even language used by this Court suggests its recognition that there is room for a requirement like that of the Sixth Circuit that a plaintiff show more than temporal proximity. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) ("*The cases that accept mere temporal proximity* between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be 'very close.'" (emphasis added)).

filing her EEOC charge. There is clear authority, in the Sixth Circuit and elsewhere, that such conduct does not constitute participation in protected activity under Title VII. *Abbott*, 348 F.3d at 543; *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000); *Brower v. Runyon*, 178 F.3d 1002, 1005-06 (8th Cir. 1999); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990). Because Petitioner did not even participate in a protected activity, she is unable to invoke the protection of Title VII in the first place.

Accordingly, even in the absence of the Sixth Circuit's "knowledge" prong, Petitioner has failed to tender sufficient proof as to the first and fourth prongs of the retaliation *prima facie* case as well.

IV. CONCLUSION

This Court should decline Petitioner's request for a change in Sixth Circuit authority to eliminate the "knowledge" prong of the *prima facie* case of retaliation. The decision-maker's knowledge of the Petitioner's participation in a protected activity is an essential element regardless of whether it is considered separately or as part of the causation prong of the analysis. Moreover, Petitioner's suggestion that, under the "knowledge" prong, only an admission "from the lips of" the decision-maker will suffice to create a genuine issue of fact is simply without merit. Finally, even in the absence of consideration of the knowledge prong, Petitioner did not participate in a protected activity and did not tender sufficient non-speculative proof as to causation – the first and fourth prongs of the retaliation *prima facie* case. Accordingly, the